

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 Adv. Case No. 20-06982-rdd

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6 In the Matter of:

7
8 SEARS HOLDINGS CORPORATION,

9
10 Debtor.

11 - - - - - x

12 KMART HOLDING CORPORATION et al.,

13 Plaintiffs,

14 v.

15 WINIADAEWOO ELECTRONICS AMERICA INC.,

16 Defendant.

17 - - - - - x

18
19 United States Bankruptcy Court

20 300 Quarropas Street, Room 248

21 White Plains, NY 10601

22
23 July 27, 2021

24 10:30 AM

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1 B E F O R E :

2 HON ROBERT D. DRAIN

3 U.S. BANKRUPTCY JUDGE

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5 ECRO: JUSTIN WALKER

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1 HEARING re Debtors' Update on Progress Toward Effective Date
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3 HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding
4 Corporation et al v. Winiadaewoo Electronics America Inc.
5 Motion to Compel Document Production and Interrogatory
6 Responses filed by Perry R Clark on behalf of Winiadaewoo
7 Electronics America Inc. (ECF #13)
8 Affidavit: Declaration of Perry Clark in Support of Motion
9 to Compel (related document(s) 13) Filed by Perry R Clark on
10 behalf of Winiadaewoo Electronics America Inc ..
11 (Attachments: # 1 Exhibit Debtors Kmart's Interrogatory
12 Responses# 2 Exhibit Debtor Sears Interrogatory Responses# 3
13 Exhibit Debtor Kmart's Responses to Document Requests# 4
14 Exhibit Debtor Sears' Responses to Document Requests# 5
15 Exhibit Privilege Log# 6 Exhibit Letter from Debtors'
16 Counsel to Court)(Clark, Perry) (ECF #14)
17
18 HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding
19 Corporation et al v. Winiadaewoo Electronics America Inc.
20 Plaintiffs' Objection to Winiadaewoo Electronics America,
21 Inc.'s Motion to Compel (related document(s) 13) filed by
22 Steven J. Reisman on behalf of Kmart Holding
23 Corporation, Sears, Roebuck and Co. (ECF # 16)
24
25

1 HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding
2 Corporation et al v. Winiadaewoo Electronics America Inc.
3 Reply In Support of Motion to Compel Document Production and
4 Interrogatory Responses (related document(s) 13) filed by
5 Perry R Clark on behalf of Winiadaewoo Electronics America
6 Inc .. (Clark, Perry) (ECF # 17)

7
8 HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding
9 Corporation et al v. Winiadaewoo Electronics America Inc.
10 Letter re Discovery Dispute Filed by Perry R Clark on behalf
11 of Winiadaewoo Electronics America Inc. (ECF # 18)

12
13 HEARING re Adversary proceeding: 20-06982-rdd Kmart Holding
14 Corporation et al v. Winiadaewoo Electronics America Inc.
15 Letter in Response to Defendant's letter dated May 21, 2021
16 (related document(s)18) Filed by Steven J. Reisman on behalf
17 of Kmart Holding Corporation, Sears, Roebuck and Co. (ECF
18 #20)

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1 HEARING re Motion to Compel /Motion to Enforce Order (I)
2 Approving the Asset Purchase Agreement Among Sellers and
3 Buyer, (II) Authorizing the Sale of Certain of the Debtors
4 Assets Free and Clear of Liens, Claims, Interests and
5 Encumbrances, (III) Authorizing the Assumption and
6 Assignment of Certain Executory Contracts, and Leases in
7 Connection Therewith and (IV) Granting Related Relief (ECF
8 #9647)

9
10 HEARING re Declaration of Kimberly Black in Support of
11 Defendant's Motion to Enforce Order
12 (related to #9647) (ECF #9648)

13
14 HEARING re Certificate of No Objection Pursuant to LR 9075-2
15 Regarding Order Enforcing the Order (I) Approving the Asset
16 Purchase Agreement Among Sellers and Buyers, (II)
17 Authorizing the Sale of Certain of the Debtors' Assets Free
18 and Clear of Liens, Claims, Interests and Encumbrances,
19 (III) Authorizing the Assumption and Assignment of Certain
20 Executory Contracts, and Leases in Connection Therewith and
21 (IV) Granting Related Relief (related document(s)9647, 9648)
22 Filed by Luke A Barefoot on behalf of Transform SR Brands
23 LLC. (ECF #9673)

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1 HEARING re Notice of Hearing on Objection and Motion for
2 Extension of Time to File an Appeal filed by James Edmond
3 Smith (ECF #9641)
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5 HEARING re Debtors' Objection to Motion to Extend Time to
6 Appeal (related document(s)9641) filed by Garrett A. Fail on
7 behalf of Sears Holdings Corporation. (ECF #9664)
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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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22 BY: ERIK L. MORABITO

23

24 JAMES E. SMITH, Pro Se

25

1 ALSO PRESENT TELEPHONICALLY:

2

3 TERENCE BANICH

4 SARA BRAUNER

5 JENNIFER BROOKS CROZIER

6 TOBEY DALUZ

7 LARI DIERKS

8 PAUL HARNER

9 DOMINIC LITZ

10 JACQUELINE MARCUS

11 VINCENT MARRIOTT

12 BRITTANY NELSON

13 GARY POLKOWITZ

14 KELSEY ROBINS

15 JOSEPH E. SARACHEK

16 ALEXANDER TIKTIN

17 DAVID H. WANDER

18 PHILIP WEINTRAUB

19 DAVID ZENSKY

20 PERRY R. CLARK

21 STEVEN J. REISMAN

22 PHILLIP D. ANKER

23 NATAN BANE

24 KIMBERLY BLACK

25 KEVIN ECKHARDT

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2 JACK HARRIS
3 CHLOE A. JASPER
4 JENNIFER S. KOOCKOGEY-LAJOIE
5 LAYA MAHESHWARI
6 MITCHELL J. MCVEIGH
7 JONATHAN H. MILLER
8 BEN PAULL
9 ALLYSON PIERCE
10 JAMES R. SHULTZ
11 MATTHEW SKRZYNSKI
12 CHRISTOPHER STAUBLE
13 JOSEPH SZYDLO
14 UDAY GORREPATI
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1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. This is Judge
3 Drain. We're here In re Sears Holdings Corporation, et al.
4 I have the amended agenda for today's omnibus hearing and
5 I'm happy to go down that agenda in order as it's stated.

6 So I think the first matter on the agenda is the
7 status conference, including the Debtors' update on progress
8 toward the effective date for the confirmed Chapter 11 plan.
9 Related to that filed this morning was a written status
10 update by the Debtors dated today, which I've had a brief
11 opportunity to review.

12 MR. FAIL: Thank you, Your Honor. You cut out at
13 least on my end and I apologize. This is Garrett Fail from
14 Weil Gotshal. Are you able to hear me?

15 THE COURT: Yes.

16 MR. FAIL: Excellent. Are you able to see me?

17 THE COURT: Yes.

18 MR. FAIL: Thank you. As one matter of
19 housekeeping before jump into the status conference, which
20 is listed as item number one on the agenda, which we filed
21 at Docket 9677.

22 If I could turn the podium over to Mr. Barefoot
23 from Cleary, there's one item that I think we can take off
24 the agenda for today.

25 THE COURT: Okay.

1 MR. FAIL: It might be efficient. Thank you,
2 Judge.

3 MR. BAREFOOT: Thank you, Mr. Fail. Good morning,
4 Your Honor.

5 THE COURT: Good morning.

6 MR. BAREFOOT: Your Honor, Luke Barefoot from
7 Cleary Gottlieb for Transform Holdco and its affiliates. I
8 just briefly wanted to item number three on the agenda,
9 which is Docket item 9647, Transform's motion to enforce the
10 sale order.

11 THE COURT: Right.

12 MR. BAREFOOT: And with Your Honor's permission,
13 I'd just like to propose a path forward on that item.

14 THE COURT: You can go ahead, Mr. Barefoot. I'm
15 sorry. Who is speaking?

16 MR. SMITH: James Edmond Smith, and I saw that
17 motion that they filed and they're asking for the budget
18 that is requested on my request, which --

19 THE COURT: Mr. Smith, you're speaking on a
20 different motion. The matter that Mr. Barefoot is
21 addressing doesn't pertain to you. It pertains to a
22 different matter.

23 You can go ahead, Mr. Barefoot.

24 MR. SMITH: Okay, I apologize. Just the amount
25 they were asking for --

1 THE COURT: Mr. Smith, I will cut you off if you
2 continue to interrupt. The matter that you are addressing
3 that involves you is not the matter we're discussing now.
4 It will come up as item five on the agenda. This is item
5 three.

6 MR. SMITH: Thank you.

7 THE COURT: You can go ahead, Mr. Barefoot.

8 MR. BAREFOOT: I apologize, Your Honor. Pursuant
9 to communications with Your Honor's chambers yesterday
10 following the filing of our certificate of no objection, we
11 are in the process of seeking confirmation that counsel for
12 the plaintiff in the Illinois state court action that's at
13 issue in the motion to enforce is authorized and was
14 authorized to receive service of the motion on behalf of the
15 plaintiff. And we sought that confirmation, but as of this
16 morning, we do not yet have it.

17 So what I would suggest, subject to Your Honor's
18 views, is that we adjourn the motion to the next omnibus
19 hearing and pursue in parallel two options. First,
20 Transform would continue to seek confirmation that
21 plaintiff's counsel was authorized to receive service of the
22 motion to enforce. And if we receive that, we would file
23 evidence of that confirmation with an amended certificate of
24 no objection.

25 Second, in the alternative, we would re-notice the

1 motion for the next omnibus hearing and file an affidavit of
2 service reflecting service of the motion and the amended
3 notice of hearing on plaintiff at their last known address
4 individually.

5 THE COURT: Right, that's fine. That procedure is
6 fine. As you noted, my concern was that the certificate of
7 service showed just service on counsel in the state court
8 action and counsel had not appeared in this case and it
9 wasn't clear whether the counsel was generally authorized to
10 receive service with respect to a motion like this, so that
11 two track approach is fine.

12 MR. BAREFOOT: Understood, Your Honor.

13 THE COURT: And consistent with my normal
14 practice, if there are no objections and I see that amended
15 certificate of service or confirmation, then we don't need
16 to have a hearing. You can submit the order with backup
17 materials, and in all likelihood, it'll be entered.

18 MR. BAREFOOT: Thank you, Your Honor. We will do
19 so.

20 THE COURT: Okay, very well.

21 MR. BAREFOOT: With Your Honor's permission, may I
22 be excused from the remainder of the hearing?

23 THE COURT: Yes, sure, that's fine.

24 MR. BAREFOOT: Thank you, Your Honor.

25 MR. FAIL: Okay, Your Honor. Garrett Fail, Weil

1 Gotshal for the Debtors again.

2 What I'll propose to do is walk the Court and
3 parties through a presentation that we filed on the docket
4 at ECF No. 9680. It's an update from the last presentation
5 that we made on April 27th in accordance with the
6 confirmation order.

7 I'll start off with an update on the progress of
8 administrative, priority, and secured claims reconciliation.
9 To date, the Debtors have reconciled more than 4,443 opt-in
10 and non-opt-out and opt-out administrative claims. That's
11 up approximately 473 from our April report.

12 The Debtors have expunged or reclassified to a
13 non-hundred cent claim approximately \$2.5 billion of claims
14 asserting entitlement to administrative, priority, or
15 secured status, and we have objections pending to eliminate
16 an additional \$1.1 billion of secured claims. That's up
17 from \$1.3 million in our April report.

18 We've allowed to date approximately 1,788
19 administrative claims, up 120 from our last report.

20 We're disputing currently through objections 40
21 non-opt-out claims that assert approximately \$6.3 million.
22 This excludes allowed claims that we're holding
23 distributions for where there are outstanding preference
24 issues only. The 40 is down from our April report and these
25 should be the total remaining population of opt-ins and non-

1 opt-out claims, Your Honor.

2 In terms of the opt-outs, the Debtors have reduced
3 their estimate as a result of objections and further
4 analysis. We've reduced our estimate of the ultimate
5 allowed amount of those by an additional \$7 million.

6 In terms of distributions, Your Honor will recall
7 we've made two distributions to date on administrative
8 claims pursuant to the administrative consent program
9 following confirmation. As the Court is aware and I think
10 all parties are, these are just a small fraction of
11 administrative claims that arose and that were satisfied in
12 the case.

13 Throughout the first year in the case and
14 thereafter, I think, you know, rough estimate, you know, \$1
15 -- \$2 billion of claims have been paid and satisfied. And
16 so, this is -- and what we've been talking about has been
17 the remainder of what remains unsatisfied, but it's
18 important to keep it in context of what's happened during
19 these cases.

20 So far, post-confirmation, Judge, \$43 million has
21 been distributed. You'll notice an increase of about a
22 million dollars as a result of catchup distributions made
23 after claims had been allowed following the last
24 distribution. We made an initial distribution in 2019 and a
25 subsequent one in 2020.

1 The Debtors have announced and proposed a third
2 interim distribution. They announced -- we announced that
3 the amount will be an additional \$10.5 million.

4 I hear some feedback. Can I ask parties to mute
5 their lines if they're not speaking?

6 THE COURT: All right. You're coming through
7 clearly here, Mr. Fail.

8 MR. FAIL: Okay. I appreciate it. Thank you,
9 Judge.

10 So we're making another distribution of \$10.5
11 million, you know, subject to today's hearing. That's an
12 equivalent additional amount of 8.3 percent to outstanding
13 creditors. It brings the total to those creditors of 37
14 percent recovery, which is approximately one-half of the
15 amount that we may owe under the admin consent program.
16 Your Honor will recall that parties are entitled to 75 or 80
17 percent of their claims.

18 The Debtors were able to make this announcement
19 after working with their restructuring committee, but
20 importantly, also with the representative for administrative
21 claims, Mr. Polkowitz, who I see on the screen, and his
22 counsel, Ms. Morabito, who I saw earlier on the screen as
23 well. The Debtors have made the announcement and are making
24 the distribution of available cash as it became available
25 and as prescribed by the confirmation order when we reached

1 the certain minimum conditions. On page 3 of the deck, we
2 provide further breakdown.

3 Before I get into that, Your Honor, we filed a
4 notice of the distribution amounts that we propose to make
5 listing each of the parties that would receive an opt-in
6 distribution, a non-opt-out distribution, and the parties
7 for whom we proposed holding back reserves for disputed
8 claims. We filed that on July 2nd, roughly 25 days ago.

9 We encouraged any party who had a question or an
10 issue to simply email the Debtors to resolve any questions.
11 We thought that that would be the most efficient way. And
12 we're happy to announce that it was largely successful, and
13 we eliminated filings on the docket.

14 We filed a revised notice early this morning. It
15 started out as yesterday afternoon and it went into early
16 this morning. We made a number of changes and a number of
17 corrections to address the responses that we received,
18 including those that came in as late as midnight last night.
19 But most notably, we increased everyone's distribution
20 percentage from the 7.3 percent that we announced on July
21 2nd to 8.3 percent, and we announced that the total recovery
22 would be increased from 36.1 to 37 percent in the notice
23 that we filed yesterday.

24 So that is positive news and positive development,
25 and we thank all the parties with whom we worked, especially

1 and including Mr. Polkowitz and his counsel, to get to where
2 we got today. The chart on page --

3 THE COURT: When do the Debtors anticipate making
4 that third distribution?

5 MR. FAIL: It's simply a matter of mechanics, Your
6 Honor. We will, following today's hearing assuming nothing
7 gets in the way, proceed to put the wheels in motion with
8 Prime Clerk to get checks mailed out and wires lined up. We
9 said that we would start on or about July 31. It's just
10 simply a matter of mechanics at this point.

11 THE COURT: Okay.

12 MR. FAIL: So on page 3, a number of things to
13 just walk through.

14 We show the number of claims that have been -- you
15 know, that will receive a distribution, and we thought it
16 important to break out the parties who have been satisfied
17 in full. So of the 1511 claims that received distributions
18 to date, 1,067 in the top cortile of the chart, or 70
19 percent of those parties that were administrative claims on
20 the confirmation date have been satisfied in full. They
21 received payments through the de minimis order that the
22 Court allowed us to pay in full the amounts that we were
23 required to.

24 That leaves roughly 444, only 444 remaining of
25 allowed opt-ins and allowed opt-out creditors. The columns

1 on the chart show the asserted amounts, the net amounts as a
2 result of setoff, the net amounts resulting from the
3 discount of the program, the amount paid, and the amount
4 remaining to be paid, including \$8.6 million that we're
5 proposing to send out to creditors now.

6 We then go on to detail the count of claims that
7 have been reconciled but are being -- distributions for
8 those claims are being held subject to resolution of
9 preferences. There's roughly 111 claims. Money is being
10 reserved for them in a pro rata distribution, so no party is
11 prejudiced.

12 We show that there are roughly 40 disputed claims,
13 and we show the Debtors' estimate of those claims, as well
14 as the asserted amount.

15 Moving down to the opt-out of claims to be
16 reconciled. We've made significant progress, as I detailed
17 earlier, and we show the amount in number and dollars and
18 the Debtors' estimate of those claims, so there's some work
19 to be done there.

20 And then we show that there a number where we're
21 expecting them to be withdrawn.

22 Moving down to the bottom of the chart, Judge. We
23 show the work that needs to be done and the work that has
24 been done importantly on the priority claims. We've made
25 significant progress. We show the Debtors' estimate of

1 those amounts. We show that we have put on objections to
2 over 400 claims that asserted secured status. We show the
3 super-priority claims that have been asserted, and we show
4 our estimate.

5 In total, the estimate of what remains to be paid
6 is \$102 million.

7 Your Honor may note that -- well, I'll go on to
8 the next page and we can into detail, a little bit more
9 detail.

10 The next page shows the estimate of additional
11 funds that would be needed to satisfy all the claims that I
12 just identified, all the 111 claims. We start with the cash
13 balance of the Debtors' estimate they'll have at the end of
14 the month. We take out the reserves that the Debtors are
15 putting aside for future needs and claims reserves.

16 If the distribution is made at 10.5, we have just
17 above the minimum thresholds that is required to be
18 maintained, the 10.7.

19 We identify and itemize the remaining of the
20 Debtors and the Debtors' estimates of future recoveries on
21 those. The Debtors have outperformed their estimates since
22 the last report. So, for example, for the real estate
23 assets, sales were showing \$1.6 million remaining. Our last
24 report showed \$1.3, and we're at -- you know, we've already
25 had recoveries on this. So in total, we show that -- we

1 show here \$26.1 million of estimated cash remaining.

2 We then carry forward some numbers from the
3 previous page showing uses, and we show the \$56.8 million of
4 administrative expense claims that need to be paid; that's
5 down from \$70.8 million last report and our estimate of
6 priority and secured net of reserves.

7 One thing to note here is the Debtors' estimate
8 for tax claims. We've included and we'll have detail later
9 on, we've included the full amount of tax claims here. Our
10 previous reporting had the amount that would have been
11 required on the effective date if we had stretched it out,
12 but we thought for full disclosure and clarity, it would be
13 better to put our full estimates in here. Net-net, we --

14 THE COURT: I'm sorry. I had a -- on the priority
15 and secured, the estimate seems to be 5 million lower than
16 the estimate on the earlier page, on the previous page?

17 MR. FAIL: It's net of reserves, Your Honor.

18 THE COURT: Okay.

19 MR. FAIL: So there's the reserves, so it tracks--

20 THE COURT: -- already for that.

21 MR. FAIL: Yup.

22 THE COURT: All right. And these -- I just want
23 to confirm. When you refer to secured, these are not --
24 this is not funded debt; this is tax liens or other judicial
25 liens or other types of things like that or just claim liens

1 by people who checked the box that their claim is secured?

2 MR. FAIL: In terms of what's been asserted, it's
3 across the board in terms of what we think net liability is,
4 Judge. There's an overlap between the relators, for
5 example, secured claim that also has a super-priority status
6 to the extent that it becomes allowed, so there's an overlap
7 and it's not all separate. It also may include, you know,
8 some of the claims that have been asserted as secured that
9 also, you know, may be administrative because they're post-
10 petition for, let's say, consignment.

11 THE COURT: Okay.

12 MR. FAIL: But we've put it all together. We've
13 put it all together here.

14 THE COURT: All right, very well. All right,
15 thanks.

16 MR. FAIL: To answer your question, it's the
17 Debtors' belief that in terms of funded debt, you know, that
18 is taken care of and that shouldn't be an issue. The
19 remaining secured is rather miscellaneous, if anything.

20 We go through additional detail of the sources of
21 what has been recovered and where we see additional
22 abilities to recover. On page 5, we compared to
23 confirmation estimates for parties' reference so that they
24 could see our recoveries. Excluding recoveries from
25 avoidance actions, sources increased by 4.7 compared -- \$4.7

1 million compared to our last report. And from confirmation
2 estimates, excluding preference recoveries, there's an
3 increase of \$67.4 million, so positive news on that front
4 and the sources.

5 On the next page, we detail the uses. And again,
6 we compare not only to our last report, but also to
7 confirmation date estimates. Our actual uses to date remain
8 below confirmation date estimates; positive news, a positive
9 report. Our total uses remain within confirmation date
10 estimate ranges, and that's detailed here on page 6.

11 In terms of the update that we can report on,
12 post-confirmation avoidance action recoveries. Page 7
13 highlights that approximately 60 percent of the eligible
14 preference matters have been settled in terms of the number
15 of counterparties. That is up from 37 percent roughly in
16 our last report.

17 Settlements have resulted in the combined cash and
18 administrative claims waiver of \$50.6 million. That's up
19 over \$7 million or up over 17 percent since our last report.

20 The Debtors' performance and go forward
21 projections remain consistent with our prior estimates.
22 This case does remain challenging. The increased time
23 during the bankruptcy pre-effective date (sound glitch) or
24 expenses in the effective date period. The Debtors believe
25 that these expenses would have been incurred in a post-

1 effective date period had the effective date occurred
2 earlier.

3 The Court is aware of, you know, some large
4 categories of expenses, including the claims reconciliation,
5 but significant amounts and much more significant amounts
6 have been spent to monetize the assets that have already
7 been distributed, including asset sales and recoveries
8 through litigation to date.

9 The Court will recall that the Debtors have
10 distributed significant amounts of cash that were not
11 available on the confirmation date, which is why it has
12 taken three distributions -- three distribution periods to
13 collect the money. This was not a liquid situation where
14 all we're doing is pushing a button to make a distribution.

15 The Debtors stand ready to work with the remaining
16 disputed creditors to resolve their claims. The preference
17 teams are ready to work to resolve those aspects. The
18 Debtors' financial advisors and other lawyers are available
19 to work on the remaining claims. We have made significant
20 progress and look forward to making this distribution.

21 Your Honor, I know Ms. Morabito is on the line and
22 had wanted to address the Court from the perspective and on
23 behalf of the administrative claims representative. But
24 before I turn the podium over to her, I'm happy to answer
25 any questions Your Honor may have.

1 THE COURT: No. You can go ahead, Miss Morabito.

2 MS. MORABITO: Thank you, Your Honor. Thank you,
3 Mr. Fail. Good morning, Your Honor. Erika Morabito, Quinn
4 Emanuel, on behalf of Gary Polkowitz as the administrative
5 expense claims representative in this case. Mr. Polkowitz
6 is also on Zoom today as well, Your Honor. Can you hear me
7 okay?

8 THE COURT: Yes, and I can see you and him also.

9 MS. MORABITO: Thank you. So the reason we wanted
10 to make a statement is, as Your Honor can imagine as this
11 case continues to unfold, numerous admin creditors reach out
12 to either Mr. Polkowitz or myself at least weekly, sometimes
13 daily, sometimes with questions about their own individual
14 admin claims and sometimes questions generally about when we
15 see the end of this case coming, what our view is on an
16 effective date.

17 And so, we see that many of them are participating
18 in today's hearing and thought it would be helpful for them
19 to sort of get, you know, our view of where things sit
20 today.

21 Everybody knows this plan was confirmed on October
22 15th, 2019, which is almost two years ago. Mr. Polkowitz,
23 of course, was appointed as the administrative expense
24 claims representative about six months after that on March
25 13th.

1 As Your Honor may recall and many of the
2 administrative creditors know, I had previously represented
3 the ad hoc group of administrative creditors and worked
4 closely with the Debtors, the UCC, and of course, the
5 administrative creditors with the assistance of this Court
6 to help construct the administrative expense claims consent
7 program, which was included in the final order, as Your
8 Honor knows.

9 So between Mr. Polkowitz and myself, we obviously
10 have a lot of history with the case and the parties here.
11 And while we're not always vocal at this hearing, we are
12 certainly conscious of the fees and that's a sensitive issue
13 to us. We have been working very closely behind the scenes
14 in this case, particularly over the past 16 months, as many
15 of the individual creditors participating today and
16 listening and those that are not know, including what Mr.
17 Fail alluded to earlier, which is pushing the Debtors really
18 to get this third interim distribution out, both
19 expeditiously, and we hope it will take place in the
20 beginning of August and certainly in a meaningful amount.

21 But while we've done our best to work
22 collaboratively with the Debtors and their professionals and
23 they have to as well, it doesn't mean that we don't share
24 some of the frustrations that have been expressed by the
25 administrative creditors in the past; we do share those.

1 You know, I'm going to touch on a couple of them.

2 Specifically, we saw Mr. Wander's letter that was
3 filed with the Court with request to getting more advance
4 notice with respect to the financial reports. We share that
5 concern. You know, we think the Debtors and their
6 professionals should be able to get financial reports and
7 presentations that they intend to file in advance of an
8 omnibus hearing more than one or two days before the
9 hearing.

10 Not that we don't understand the complexity that
11 goes into those reports and the vetting process and the
12 signoff that's needed. But, look, professionals are getting
13 paid, all professionals, and I include myself in that
14 bucket, are getting paid significant fees in this case and
15 creditors and interested parties ought to have a little more
16 time to review these reports in advance of the hearing.

17 And while the administrative expense claim
18 representative does receive the reports, it's usually only
19 three days or so before the hearing, and those are calendar
20 days, those aren't business days. But it's just not enough
21 time given that for a status in this case for those numbers
22 to be properly diligence so that the admin creditor can also
23 weigh in and present its view to the Court with respect to
24 any of the numbers and financial reports presented by the
25 Debtor.

1 And this is particularly important in this case
2 and to Mr. Polkowitz because he is bound by a
3 confidentiality agreement. So oftentimes when creditors
4 reach out to us, we are unable to share certain things that
5 we may know by the Debtors. This is one of the rare
6 instances, and it's done quarterly, where the Debtors are
7 required to disclose public information, and so, everybody
8 should have an opportunity to view and vet and ask
9 questions.

10 So this is something that we are working with the
11 Debtors. This is not to say that the Debtors have breached
12 any of its obligations.

13 I'm sorry. I have a 12-year-old responsible for
14 two dogs going crazy. I apologize, Your Honor.

15 THE COURT: That's all right.

16 MS. MORABITO: I'm sorry. I stand and discuss,
17 Your Honor, so I'm still trying to do this with a 12-year-
18 old who has now wrangled my dog, so I apologize.

19 This is not to say that the Debtors have breached
20 any of their obligations or haven't complied, that they've
21 met the requirements. I'm sure that they have. But it's
22 just a point of if they can, try to suggest maybe getting
23 reports to the claims administrator hopefully within five
24 days in advance of the hearing, even if it's in draft form,
25 and trying to get what can be filed, understanding it may be

1 subject to updating at the actual hearing.

2 But if we can get things on file at least three
3 days in advance of the hearing so people have a reasonable
4 opportunity, including the Court, to be able to review and
5 ask questions at the omnibus hearing. I think that would go
6 a long way.

7 The second thing that we've shared frustration
8 with, and the Debtors share the frustration with as well, is
9 that, yes, it's been almost two years since the plan has
10 been confirmed and it hasn't gone effective. We all know
11 that there's many reasons for that and I don't need to get
12 into those.

13 But I do think it's important to note that the
14 administrative expense claims representative with the
15 Debtors, with the committee, and with other professionals
16 and few stakeholders in this case are continuing to work
17 hard to come up with a construct that would get this case to
18 an effective date sooner than waiting for the proceeds from
19 the Transform litigation to come in.

20 I think we've all realized that waiting for that
21 to happen could delay the effective date in this case
22 potentially for years.

23 We are also not resting on the third interim
24 distribution. I think it's great progress, and we think
25 it's a significant amount. As Mr. Fail alluded to, it is

1 now 50 percent of what certain people agreed to on the opt-
2 in. But given the amount of administrative costs to the
3 estate continue to accrue, including professional fees, we
4 are working on a construct. We've presented a construct to
5 the Debtors. We have calls set up with them this week in
6 more detail. I obviously can't get into that anymore today.

7 But the point is, and this is important for
8 administrative creditors here, we are working to get this
9 plan to go effective as expeditiously as possible. Nobody,
10 not us, not the Debtors, and I'm sure not the Court are
11 content with letting this case linger any longer than it has
12 to.

13 To that end, Your Honor, we have had calls with
14 counsel to Transform, with litigation counsel at Akin, with
15 Mr. Brauner as the representative for the unsecured
16 creditors' committee, the fee examiner, representatives from
17 (indiscernible) for the structuring committee, and numerous
18 administrative creditors.

19 It's clear from these meetings and calls that we
20 all have to work together to get this to at least go
21 effective. The good news is that there's no question that
22 we all share the common goal and we're committed to trying
23 to reach it. That said, we know the task at hand will not
24 be an easy one.

25 And to complicate things further, Your Honor,

1 there are several administrative creditors that have their
2 own individual claims, and they have reached out to Mr.
3 Polkowitz and myself asking for assistance with respect to a
4 resolution of those claims.

5 The difficulty that the admin expense
6 representative has is his duty is to the admin creditors as
7 a constituent, as a group, not an individual admin creditor.
8 What Mr. Polkowitz cares about is the numerator and the
9 denominator. We want as much money to come into the estate
10 so that we can get the largest distribution so we can this
11 plan to go effective.

12 Unfortunately, that means that in some instances,
13 there are inherent conflicts between an individual admin
14 creditor's claim where, for example, there could be a
15 preference being sought against them, which of course, would
16 then reduce the amount of the claims if the Debtors were
17 successful on that and would increase the amount of the
18 distribution to the other administrative creditors, and that
19 obviously would be something that would be in the best
20 interest of all the administrative creditors.

21 Notwithstanding that, we have done our best to
22 serve as a conduit. So to the extent that admin creditors
23 have reached out to us on a one-off basis and asked for
24 assistance, the assistance that we have been able to provide
25 is to make sure and request the Debtors and asking that and

1 others at least are in communications with those admin
2 creditors who have not yet been able to reconcile their
3 claims, and I think that process has worked.

4 I appreciate the Court's time in letting us share
5 our perspective of where things stand. Both myself and Mr.
6 Polkowitz are happy to answer any questions if the Court has
7 any.

8 THE COURT: Okay. I don't. I think all your
9 statements are very sensible and I agree with the approach
10 that you and your client have taken as you've laid it out.

11 I did have, before this hearing, Mr. Wander's
12 letter that also raised the issue you had raised about
13 whether the report that Mr. Fail went through at the start
14 of this hearing could not come out earlier than on a
15 quarterly basis. Of course, the confirmation order in
16 Paragraph 14 says that the update shall be no less
17 frequently than on a quarterly basis and the Debtors have
18 lived up to that.

19 But I think that the advance notice that you
20 requested, particularly given the role that Mr. Polkowitz
21 plays and the confidentiality constraints he's under, makes
22 sense, so that if it can go out a week before the quarter, I
23 think that would be constructive here.

24 MR. FAIL: Your Honor, if I may just respond
25 briefly from the Debtors' perspective on how we've been

1 performing, you know. We also read Mr. Wander's letter. It
2 is devoid of facts, right? So what isn't included is the
3 fact that we filed our quarterly operating reports since
4 confirmation.

5 THE COURT: No, it's clear, and Miss Morabita made
6 it clear and it's clear --

7 MR. FAIL: No, I know Ms. Morabita, I know.

8 THE COURT: -- no matter what that you haven't
9 done anything wrong. You've complied completely with the
10 plan and the order. I'm just suggesting that subject to
11 update, which you can do in the week before the omnibus
12 hearing, it makes sense if you can do it to get the report
13 out a week beforehand.

14 MR. FAIL: We're happy to, Judge. I mean, in the
15 old days, we would be bringing printouts to Court with us,
16 and this would be a supplement to my oral presentation.

17 THE COURT: Right.

18 MR. FAIL: We're in the world of electronic Zooms
19 and we thought it was already something superfluous or extra
20 that we were doing by providing this report.

21 THE COURT: I think --

22 MR. FAIL: To the extent that we can, we'll put it
23 out there, we'll put it out there earlier. We also haven't
24 been inviting, you know, Q&A from the creditor, individual
25 creditor population, at the omnibus hearings.

1 THE COURT: Right.

2 MR. FAIL: So there's a balance.

3 THE COURT: I think that's fine. I'm saying this
4 in part because of the nature of the administrative expense
5 creditor body. A number of them are sophisticated and
6 understand the Chapter 11 process and/or have capable
7 counsel, but a lot don't and find the process difficult to
8 understand. And I think the report is helpful to enable
9 them to understand, but it's also helpful for them to be
10 able to walk through it with Mr. Polkowitz or his counsel.

11 So again, this is not a criticism of the Debtors
12 and it's clear to me that they have not breached anything in
13 the confirmation order or the plan, but it's just a
14 suggestion. That extra week I think would be productive on
15 top of the clear desire that the Debtors have expressed to
16 engage with the administrative expense creditors whose
17 claims have not yet been resolved and the role that the
18 administrative claimants representatives, i.e., Mr.
19 Polkowitz, has as a conduit to the Debtors. So I think that
20 probably is enough said on that point.

21 Does anyone else have anything to say on the
22 status update?

23 MR. FAIL: The only other thing I would add,
24 Judge, is that, as Ms. Morabito mentioned that she intends
25 to provide a proposal to parties. The Debtors have also,

1 and I just figured, you know, that's behind the scenes,
2 that's, you know, the normal Chapter 11 case trying to
3 happen behind the scenes, but, you know, there are
4 settlement proposals being contemplated. The Debtors are,
5 you know, involved and making suggestions and proposals as
6 well, and we're optimistic that we'll find a path forward
7 together.

8 THE COURT: Okay, all right. I think it is fair
9 to say that absent one of those proposals or a combination
10 of them being finalized and put out on notice. The
11 recoveries here, as I think was always the case, in large
12 part will depend on the ESL litigation.

13 But you all are correct that that is complex
14 litigation. The Complaint is over 200 pages, and I'm
15 working on a series of motions to dismiss, which dovetails
16 with another roughly 200-page Complaint in another case
17 raising similar issues. And obviously those things, given
18 the quality of the lawyers involved and the complexity of
19 the arguments, take time and that's just the first stage in
20 the litigation, of course.

21 I think all of the movants who made motions to
22 dismiss in those two litigations would have to understand
23 from the oral argument that took place that those motions
24 are not going to be uniformly successfully and that that
25 litigation will continue in some form. But it is high-

1 stakes litigation that if not resolved will involve a lot of
2 discovery and ultimately, if it's tried, a complex trial.

3 So that shouldn't be a surprise to anyone, but I'm
4 laying it out there, so they understand it.

5 MR. FAIL: Appreciate that, Your Honor. Thank
6 you.

7 THE COURT: Okay.

8 MR. FAIL: The next item on the agenda is --

9 MR. ZENSKY: Excuse me, counsel? Your Honor, it's
10 David Zensky. Can I respond to Mr. Fail's comments?

11 THE COURT: Sure. Can you just remind me who
12 you're representing?

13 MR. ZENSKY: Yes, of course, Your Honor. We
14 represent -- Akin Gump Strauss Haur & Feld. We represent
15 the litigation designees in the complex litigation you were
16 just discussing.

17 THE COURT: Right, the ESL litigation.

18 MR. ZENSKY: Yes. I just wanted to say so the
19 Court is crystal clear. Mr. Fail referred to a settlement
20 proposal. It's not something that has -- I'm not sure what
21 part of the litigation --

22 THE COURT: Let me interrupt you. I assumed --

23 MR. ZENSKY: -- it was not us.

24 THE COURT: -- that both Miss Morabito and Mr.
25 Fail when they were talking about settlement proposals were

1 not proposing or discussing a settlement of the ESL
2 litigation. And so, my remarks were really to make the
3 point that unless their proposals bear some fruit, there
4 will be, I think, an inevitable delay here because the
5 recovery to get to an effective date otherwise will be, I
6 believe, dependent, at least in some respect, on the ESL
7 litigation's outcome, and that's not something that's
8 imminent.

9 And, of course, the committee, as a representative
10 for all the unsecured creditors, is pursuing that
11 litigation. I may have just confirmed it, but I took it as
12 that the proposals that Miss Morabito and Mr. Fail were
13 talking about were not to settle that litigation.

14 MR. ZENSKY: Thank you, Your Honor. I just wanted
15 to make sure that the Court and parties were clear on that.
16 Thank you.

17 MR. SMITH: Hey, Your Honor, I have a question
18 about the ESL litigation with these people from ESL.

19 THE COURT: I'm sorry. Who is speaking?

20 MR. SMITH: Yes, sir. Yeah, I'm literally
21 speaking because I'm wondering when the --

22 THE COURT: Could you just state your -- can you
23 state your name, please?

24 MR. SMITH: My name is James Edmond Smith, and I
25 am a senior director for Sears Roebuck & Co.

1 THE COURT: Okay.

2 MR. SMITH: And we were wondering when the senior
3 retirement plan for ESL was going to be paid back before
4 they expected to buy back the savings plan from everybody's
5 litigation?

6 THE COURT: I don't know the answer to that
7 question, but it's not part of the ESL litigation that we've
8 just been discussing.

9 MR. SMITH: ESL is with Lampert, and Lampert is
10 trying to acquire what --

11 THE COURT: Mr. Smith, please. This is not
12 something that either I know the answer to, nor that I
13 believe is, in fact, relevant to this case.

14 MR. SMITH: That's what he's trying to acquire and
15 there should be absolutely no reason why --

16 THE COURT: Mr. Smith --

17 MR. SMITH: -- Mr. Fail feels he should oversee by
18 doing any of my job because of the Hadco of a company,
19 Orange company. You guys, there's -- I can't do everything,
20 and I apologize for saying this right now -- but you need a
21 wet master and you guys have to reflect better. This is not
22 professional, and that's all I have to say.

23 THE COURT: All right, very well. Thank you.
24 Okay.

25 MR. FAIL: Judge, could I ask a question?

1 THE COURT: Why don't we proceed then to the next
2 matter on the agenda, which involves the discovery dispute
3 and motion to compel under --

4 MR. FAIL: Judge, can I -- it's Garrett Fail. Can
5 I just interrupt? Mr. Terence Banich from Katten is going
6 to handle the adversary proceeding matter for the Debtors,
7 but I just wanted to note. I think that items K and L on
8 the agenda were inadvertently listed and that are not
9 related and are not pending today. So I'll turn it over to
10 Mr. Banich, but I heard you mention the discovery and I see
11 that those letters were on there, and so, I just wanted to
12 make sure that that --

13 THE COURT: All right. Really just focusing on
14 the motion to compel under Rule 37.

15 MR. FAIL: Thank you.

16 THE COURT: But I saw Mr. Wander raise his hand.
17 So before we do that, Mr. Wander, do you have something to
18 say on the case conference.

19 MR. WANDER: Yes, Your Honor. Could I ask a
20 question on page 7 of the quarterly report?

21 THE COURT: Sure.

22 MR. WANDER: It refers to initial avoidance action
23 matters, 3,549 of them, and then the next line says total
24 actions determined to be ineligible, 1,283. My question is,
25 was that after adversary proceedings were filed that the

1 1,283 were determined to be ineligible?

2 THE COURT: Do you know the answer to that, Mr.
3 Fail, or do we need to have someone from the preference --

4 MR. FAIL: I don't, but I guess I don't get -- I
5 don't understand the relevance or importance of it, but I
6 don't know it offhand also.

7 THE COURT: Well, it might be -- I mean, it's a
8 legitimate question. I think the Debtors should ask one or
9 more of the preference firms that I'm assuming gave that
10 information to you, the preference recovery firms that gave
11 that information to Weil Gotshal to prepare the report.

12 It goes to, I guess, the assessment of how the
13 preference litigation was legitimately described to the
14 parties in the case and how it's proceeded, that's all, and
15 whether this was litigation or a potential --

16 MR. FAIL: It doesn't, right. I mean, it doesn't
17 -- it just doesn't change this -- it doesn't change this
18 report and there's nothing pending is what I'm saying.

19 THE COURT: I don't think it -- I don't know
20 whether it does, but again, one of the aspects of this
21 report is to compare the estimates that were made at the
22 confirmation hearing. And I don't believe that preference
23 litigation had been started then, so you can see that if
24 you're looking at the preference claims, they could be
25 described as claims that at the confirmation hearing people

1 thought might exist or it could be rather they'll report on
2 the litigation that was actually brought, that's all. So
3 I'd say --

4 MR. FAIL: I'll have more information by our next
5 quarterly report, Judge.

6 THE COURT: Right. But in the meantime, they can
7 supply that to Mr. Wander, that information.

8 MR. WANDER: Can I ask a follow-up question?

9 THE COURT: Sure.

10 MR. FAIL: It's like free discovery for a
11 potential motion that's coming, Judge. I'm not really --
12 okay, we can do that.

13 MR. WANDER: The next line item is matter 7, and
14 it indicates that that represents \$523.7 million of
15 transfers. My question is, what was the approximate
16 percentage recovery that the estate got on that? I thought
17 I saw a number somewhere of approximately 19 million, but I
18 didn't know if that was it, which would be under a 5 percent
19 recovery.

20 So, Judge, that's my follow-up question, Judge,
21 and I'm happy to follow-up offline on this. It doesn't have
22 to be answered right now.

23 MR. FAIL: I can answer that right now.

24 THE COURT: Well, it may not have to be answered
25 ever.

1 MR. FAIL: I can answer that right now.

2 THE COURT: That type of information, unless it's
3 already been made public, doesn't necessarily have to be
4 answered since that is --

5 MR. WANDER: I thought it was public information.

6 THE COURT: Well, I don't know.

7 MR. FAIL: We say on the left side of the page
8 that we've received a combination of cash and the claims
9 labors of \$50.6 million. Each case is different, each
10 percentage is different, and we're not providing anything
11 more than we've provided. It's not to the benefit of
12 creditors.

13 THE COURT: Right. I've only required aggregate
14 reporting on this.

15 MR. FAIL: Mr. Wander represents defendants in
16 ongoing preference actions. It's inappropriate to provide
17 anything further.

18 MR. WANDER: I was just curious if the Debtor is
19 able to break out of the 50.6 million how much is cash that
20 has been received and how much are administrative labor.

21 THE COURT: It probably is. But again, Mr.
22 Wander, I've not required that for an obvious reason.

23 MR. WANDER: Okay. Thank you, Your Honor.

24 THE COURT: Okay. All right. So the next matter
25 on the agenda is in Kmart Holdings Corp and Sears, Roebuck &

1 Co. v. Winiadaewoo Electronics America, Inc., and it is the
2 motion of the defendant, Winiadaewoo to compel production of
3 certain documents and answers to interrogatories. I've
4 reviewed the motion and the exhibits, the plaintiff-debtors
5 objection, and the reply.

6 I'll take appearances in a second, but -- well,
7 why don't I do that now and then I'll ask my first question
8 on this and then hear brief oral argument.

9 MR. BANICH: Good morning, Your Honor. Terence
10 Banich for the Debtors and the plaintiffs in the adversary.

11 THE COURT: Good morning.

12 MR. CLARK: Good morning, Your Honor. My name is
13 Perry Clark. I am counsel for the defendant, Winiadaewoo
14 Electronics America Inc.

15 THE COURT: Okay, good morning. All right, so
16 either of you could probably answer this. The focus of the
17 correspondence and the discovery conference that I held and
18 most of the briefing on this, certainly I think all of the
19 objection and the reply, pertain to the document production
20 request, Request for Production No. 3, "Documents concerning
21 the 'due diligence evaluation' conducted by plaintiff
22 referenced in Paragraph 21 of plaintiff's Complaint."

23 But the motion sought responses also to two
24 interrogatories, Nos. 5 and 6. Is that still at issue or
25 has that been resolved, the interrogatory aspect of the

1 motion.

2 MR. CLARK: Your Honor, this is Perry Clark for
3 the defendant. That issue has not been resolved. We're
4 seeking to compel interrogatory responses as well.

5 THE COURT: Okay. All right. Well, why don't I,
6 I guess, focus on that first. The basis for the objection
7 to the two interrogatories is that the interrogatories seek
8 information protected by the attorney-client privilege
9 and/or work-product doctrine. But the interrogatories ask,
10 Interrogatory No. 5 asks to identify each person with
11 knowledge or information concerning the due diligence
12 evaluation referenced in Paragraph 21.

13 And Interrogatory No. 6 asks to identify the
14 existence, custodian, and location and provide a general
15 description of each document concerning the due diligence
16 evaluation.

17 As to the first one, again, identify each person
18 with knowledge or information. I don't see how that would
19 implicate or be privileged under either attorney-client
20 privilege or work-product doctrine.

21 MR. BANICH: I assume that question is directed at
22 me, Your Honor?

23 THE COURT: Yes.

24 MR. BANICH: Terence Banich for the plaintiffs.

25 Good morning. Yeah. I would suggest that the objection is

1 twofold in that, you know, we obviously want to be careful
2 about when getting on the issue, subject matter of the due
3 diligence investigation, dipping our toe into a substantive
4 response and risking sort of a gotcha, you know, waiver
5 argument.

6 But I would suggest on the merits of it, all of
7 the information requested by those two interrogatories is
8 reflected in our privilege log.

9 THE COURT: Right. But how is it -- I don't see
10 how this is privileged though, right? It's an interrogatory
11 and you're just identifying each person with knowledge or
12 information, so you could say, you know, lawyer X or
13 accountant Y that worked with lawyer X. But to me, that's
14 neither a waiver of the privilege nor privileged.

15 MR. BANICH: Well, on that understanding, we'd be
16 happy to just answer those two interrogatories referencing
17 the same people and information that's reflected on the
18 privilege log. That's fine, Your Honor. We're happy to do
19 that.

20 THE COURT: And then there's the request for a
21 general description of each document concerning the due
22 diligence evaluation. Did the parties discuss what was
23 meant by the term general description? I mean, again --

24 MR. BANICH: I don't recall such a discussion.

25 THE COURT: -- this didn't really come up in our

1 discovery conference, so this is really the first time I've
2 dealt with this point with the two of you. Has that been
3 discussed?

4 MR. BANICH: Right. I don't recall -- I'm sorry.
5 I don't recall such a discussion with Mr. Clark during our
6 separate conferences or certainly not when we had our
7 conference with you, Your Honor. But I would suggest that
8 the only -- in the context of this, again, the privilege log
9 provides, you know, sort of a basic general description of
10 the documents as Rule 26(b)(5) requires.

11 THE COURT: Okay. So Mr. Clark, are you looking
12 for more than that with regard to Interrogatory No. 6 where
13 you request to provide a general description of each
14 document concerning the due diligence evaluation?

15 MR. CLARK: I'm sorry. Your question was are we
16 asking for more than that in response to the inter- --

17 THE COURT: More than what is -- more than the
18 description of the document in the privilege log, which is I
19 guess Exhibit 5 to the motion.

20 MR. CLARK: No, I don't think so. If that's what
21 they're going to stand on for the description of the
22 document, we'll take that.

23 THE COURT: Okay, all right. I just want to get
24 that out of the way. I think then that confirms that the
25 real issue here is the Request for Production No. 3, which

1 is the request for the actual documents concerning the due
2 diligence evaluation. And I'm happy to hear oral argument
3 on that point, although again, I've reviewed the parties'
4 pleadings on it.

5 MR. BANICH: Your Honor, Terence Banich for the
6 Debtors. I'm not sure which -- if you'd like the proponent
7 of the motion to lead off or the objector.

8 THE COURT: Well, I guess, I mean, this really, I
9 think, generally goes with who has the burden of proof. And
10 the burden of proof as to whether a document itself is
11 privileged within the parameters of the privilege is on the
12 party asserting the privilege.

13 But I did have a question, which is, there are two
14 aspects of that. First, the elements of the privilege
15 itself, either attorney-client or work-product, and it was
16 not clear to me whether there is a dispute as to whether the
17 elements of attorney-client privilege or work-product
18 privilege or any of them are in dispute here.

19 Now let me start with this question. As far as
20 the attorney-client privilege is concerned, then in part
21 this is because it's in microscopic or almost microscopic
22 print, which documents are relying on the attorney-client
23 privilege for not producing?

24 MR. BANICH: Your Honor, thank you. Yes, and I
25 recognize the font size on the privilege log. I guess

1 someone small tried to fit it all on a single page and not
2 have the rows cascade over.

3 THE COURT: Right.

4 MR. BANICH: But I believe, yeah, I believe if you
5 look at the second-to-last column from the right under the
6 reason withheld is what it's called, some of them will
7 contain references to attorney-client, work-product, or
8 both. The majority of the documents -- they're not
9 numbered, I mean, other than the control number that you see
10 there.

11 THE COURT: Right.

12 MR. BANICH: So I can't really refer to them by
13 row one or two without counting down. But the easiest way
14 to reference that is just to see the reason withheld, and
15 the descriptions are different to account for that
16 difference.

17 But to answer Your Honor's question from the
18 beginning and as we noted in footnote 1 of our objection on
19 page 5, I don't read the motion or even the reply to
20 challenge the -- to make an argument challenging whether or
21 not the elements are satisfied here, and we note that in the
22 footnote.

23 This really kind of is a broader -- the brush is
24 broader, and it just goes to whether or not, you know, as a
25 general matter, we can stand on the objection that the due

1 diligence investigation is opinion work-product and, in some
2 cases, also were attorney-client communication, whether or
3 not you could just withhold those generally. We're not
4 duking it out about the elements really.

5 THE COURT: Okay.

6 MR. BANICH: You can see that in the motion
7 papers.

8 THE COURT: That was my impression but let me ask
9 Mr. Clark about that.

10 MR. CLARK: Your Honor, I didn't mean to interrupt
11 Your Honor.

12 Our response to that is, we actually do dispute
13 that the elements of both the privilege and the work-product
14 based on the disclosure and the privilege log that a number
15 of these documents were prepared by the data analysis and
16 advisory firm that works with counsel with plaintiffs.

17 And what they seem to reflect and what we've
18 pointed out in our moving papers is that, you know, the due
19 diligence analysis has a factual component. It's not
20 entirely, you know, the lawyer's opinion of whether or not
21 the due diligence investigation was sufficient and, frankly,
22 we don't care about that. I mean, we know that counsel for
23 the plaintiffs thinks what they did was legally, that their
24 opinion is that the due diligence is reasonable. What we're
25 after are the facts underlying that due diligence

1 investigation.

2 And here, when you look at the privilege log, I
3 mean, what looks like happened was it had a data analysis
4 and advisory firm conduct an analysis of ordinary course of
5 business and substantial new value and reach a conclusion.

6 And as we pointed out in our opening brief, you
7 know, you can have a data analysis firm conduct a due
8 diligence investigation and you could rely on that as your
9 argument to say why you did a due diligence.

10 And so here, the dispute that we have over the
11 applicability of the privilege relates to the fact that
12 there are probably bare facts underlying this analysis that
13 should be produced and the plaintiffs haven't carried their
14 burden of showing that the information in their privilege
15 log is actually legal advice or actually is a lawyer's
16 opinion, as opposed to the bare facts.

17 And again, we're not interested in what the
18 lawyers think about the merits or the reasonableness of due
19 diligence. We just want the facts underlying. So that's
20 the dispute about the elements.

21 THE COURT: But I think you -- I'm asking a more
22 narrow question, and I think you're skipping a step. I'm
23 asking whether there is a dispute that you have raised as to
24 whether the documents that are being withheld here are
25 covered by the work-product doctrine itself, which has, you

1 know, a specific set of elements that apply to it and a
2 specific set of inquiry as to the input in it of non-lawyers
3 and the capacity in which they were working and the capacity
4 in which the document was prepared or the context in which
5 it was prepared, et cetera.

6 I did not get the impression that you were making
7 those types of arguments. They don't really appear in the
8 motion, in contrast to the argument that under Rule
9 26(b)(3), they could be compelled to be produced
10 notwithstanding the privilege, or alternatively, that the
11 privilege was waived.

12 MR. CLARK: We are certainly making both of those
13 arguments, Your Honor. And I think again, on the narrow
14 question of does the privilege, does work-product apply to
15 the documents in the privilege log. Again, our argument
16 would be to the extent that the information on the privilege
17 log identifies spreadsheets that contain facts, we would say
18 that's not privilege.

19 THE COURT: But you haven't briefed any of that,
20 right? You haven't briefed the -- look, there are scores of
21 cases literally that discuss when factual information that
22 is included in or made a part of a document is or is not
23 subject to the attorney-client privilege or the work-product
24 privilege, and that's not the issue that the parties have
25 addressed here, those types of cases.

1 And I think if -- frankly, I think if that point
2 had been raised, there would have been a different
3 objection, I expect supported by an affidavit or a
4 declaration that said, you know, the firm, the law firm
5 retained so and so or consulted with so and so before the
6 commencement of this litigation to prepare this information.
7 We discussed what would be relevant as a legal matter. Or
8 maybe it wouldn't say that; maybe it just said we had this
9 information already and we used it.

10 But I don't think that issue's really been joined.
11 You're free to join it. I just don't think it's before me
12 today.

13 MR. CLARK: I understand. I understand Your
14 Honor's notice you read the briefs. I think all I would say
15 is that the issue, the way it's been played out as the
16 parties were addressing it was simply our position that if
17 they had said -- you know, there are a number of ways to
18 prove due diligence. There's nothing magic about due
19 diligence. It has to be done by a lawyer.

20 I think our point was simply that you could just
21 provide the facts.

22 THE COURT: Well, I'm not --

23 MR. CLARK: And they're saying --

24 THE COURT: You know, I'm not so sure that's
25 really the case here given that what the statute says in the

1 new language that came in the pleading of 2019. The trustee
2 may, based on reasonable due diligence and the circumstances
3 of the case and taking into account a party's known or
4 reasonably knowable affirmative defenses. If you're
5 referring to affirmative defenses, you really -- that's a
6 legal issue, right? You need to -- I mean, it's at least
7 reasonable or logical to assume that the bean counter has to
8 be instructed as to what's relevant as far as an affirmative
9 defense.

10 MR. CLARK: I think that's right, Your Honor, and
11 I think, you know, congress when this language was inserted
12 obviously made pains to say it's due diligence in the
13 circumstances of the case. And, you know, I don't think of
14 this requires that a plaintiff, you know, point to their
15 Rule 11 analysis, their prefiling investigation. I think
16 congress left it up to, you know, the circumstances of the
17 case, and any number of things would meet the due diligence
18 requirement. I don't think --

19 THE COURT: But it's -- but again, I'm going back
20 to the point that I started this line of questioning about,
21 which is are the parties fighting about whether the
22 privilege applies -- the work-product doctrine privilege or
23 the attorney-client privilege -- or really are they fighting
24 about whether Rule 26(b)(3) requires disclosure
25 notwithstanding the privilege. And my distinct impression

1 is that what they were fighting about is the latter, and
2 that may well include -- does include the points you've been
3 making, the difference between facts and opinion, for
4 example.

5 But it's clear from the case law, although the
6 parties didn't brief it because I don't believe it was
7 raised, that attorney work-product can and, in fact, usually
8 does include plenty of facts, just raw facts because that's
9 what lawyers do; they take the facts and apply the law to
10 them.

11 And it appears here in this statute that congress
12 is requiring due diligence that pertains to a legal issue,
13 which is the applicability of defenses, as well as, of
14 course, to the elements of the -- other elements of a
15 preference claim, and someone needs to be instructed by
16 that.

17 So I don't think what you're fighting over here
18 is, for example, whether a preference run by an accounting
19 firm was done at the instruction of and as part of the
20 preparation for this lawsuit, as opposed to just a run that
21 they had done, you know, years ago.

22 I think what you're arguing about is Rule 26 and
23 waiver, so I think we should get to that point. Again, if
24 you want to make the other argument, you can, but just not
25 today because I don't think it's been made. So with that, I

1 think we should get to the Rule 26(b)(3) point and also the
2 waiver issue.

3 MR. BANICH: Your Honor, would you care for me to
4 address those points?

5 THE COURT: Sure, why don't you go ahead on that
6 point.

7 MR. BANICH: Okay. I understand that as the party
8 claiming the applicability of the work-product doctrine
9 here, it's our burden to establish that, at least on a prima
10 facie basis, it applies.

11 And I think as Your Honor concluded, at least
12 preliminary at our discovery conference, which now seems
13 like such a long time ago, that our privilege log
14 accomplished that. I believe Your Honor made a comment or
15 two to that affect.

16 At the core of the matter is these documents that
17 where most of them are spreadsheets where we, as Your Honor
18 discussed earlier, the preference professionals that's a
19 combination of Katten and Acumen, now known as Stretto, went
20 through the portfolio of potential preference targets to
21 figure out what the potential exposure was.

22 And that is the document, there's a few iterations
23 of it, that's the document that Mr. Clark wants produced.
24 And I think the first task here is to get into whether or
25 not, as I think Your Honor preliminarily concluded, that

1 these documents are inherently opinion work-product. And if
2 that's the case, that is the end of the line. It's the end
3 of the discussion because, as we emphasize in our papers,
4 Rule 26(b)(3)(B) states that the court must protect against
5 disclosure of opinion work-product, and several cases talk
6 about how it's virtually undiscoverable and such.

7 So I think, I would suggest that the first task
8 here is to figure out what bucket, if you will, these
9 spreadsheets fall into. And as we talk about, in our
10 objection, is fact work-product an opinion work-product.
11 Fact work-product is, on the face of it, not discoverable,
12 but can be compelled to be produced. Opinion work-product
13 is much different.

14 And we, in our objection I think, very clearly
15 explain why a spreadsheet analyzing whether or not we have a
16 good cause of action against the defendant and what their
17 defenses might be worth is, by definition, an example of
18 opinion work-product.

19 THE COURT: Well, can I stop you at that point?

20 MR. BANICH: Of course.

21 THE COURT: A spreadsheet can say a lot of
22 different things, you know, you can have a lot of different
23 columns on it. The Complaint in this adversary proceeding
24 says that the plaintiff, in Paragraph 17 and it attaches
25 also as an exhibit, analyzed data, including invoice number,

1 invoice date, invoice amount, and clear date. And then,
2 Paragraph 21 says, "Players perform their own due diligence
3 evaluation." Paragraph 22 says, "After performing their own
4 due diligence valuation."

5 So a spreadsheet could have a column with -- which
6 is somewhat similar to Exhibit A, it could list invoice
7 number, invoice date, invoice amount, clear date for each of
8 the payments and the statement of account. It may also have
9 a column that shows historical payment information, you
10 know, payments within a band over the previous one year.

11 It shows when those payments were. So to me, that
12 would probably cover most defenses. It might -- you know,
13 you might have a column that says any new value. It doesn't
14 necessarily have to have a column that puts a percentage
15 recovery on it, right? I mean, a spreadsheet wouldn't have
16 to say that. It might not.

17 That might be the separate memo that the
18 spreadsheet's attached to. So I understand very well your
19 distinction between opinion work product and fact work
20 product, but I'm not sure that the descriptions in the
21 privileged log highlight whether the fact work product could
22 be isolated from the opinion work product.

23 MR. BANICH: All right. Well, I would say as an
24 initial matter that I also -- the defendant has also not
25 challenged the -- at any point, the adequacy of our

1 privileged log. This -- the issue has always been the more
2 esoteric issue of whether or not due diligence materials are
3 discoverable legally.

4 THE COURT: I understand.

5 MR. BANICH: So we -- all right, fair.

6 THE COURT: And that was the subject really of our
7 conference, that there was in essence --

8 MR. BANICH: That's right.

9 THE COURT: -- Congress forced a waiver, if you're
10 going to refer to it in your complaint --

11 MR. BANICH: Right.

12 THE COURT: -- there's a waiver.

13 MR. BANICH: Right. And we covered that in the
14 discovery conference.

15 THE COURT: Right.

16 MR. BANICH: And I'm happy to discuss that again,
17 if you would like.

18 THE COURT: No. I'm really focusing on this other
19 issue, which I think is --

20 MR. BANICH: All right.

21 THE COURT: -- really the one that Mr. Clark is
22 primarily focusing on, which is one could under -- he's
23 saying -- Rule 26(b)(3), and particularly (b)(3)(b), protect
24 against disclosure of the opinion work product. And still
25 provide the information on the payment history, which I'm

1 assuming is in their spreadsheets.

2 MR. BANICH: Very well. Well, let's -- I guess we
3 have to -- there's a couple of points to unpack there. And
4 the first is what exactly are we withholding? Because you
5 know, a spreadsheet as Your Honor correctly points out could
6 contain a lot of information or it could be much more
7 simplified.

8 The -- I would start out by saying that the
9 document we've actually withheld is basically a top line
10 analysis of gross transfers and what we think the case is
11 worth net of various defenses. And it's not only for this
12 defendant, it's a spreadsheet that covers many targets and
13 defendants.

14 THE COURT: All right, but they --

15 MR. BANICH: One line of which is this defendant,
16 all right, I guess there's two defendants.

17 THE COURT: Okay, but there -- I mean, there are,
18 I don't know what, about 11 documents I think that are
19 referred to on the privileged log. So again, I --

20 MR. BANICH: Right. Right. They went through
21 different models as time went on. You know, there was
22 different versions of the spreadsheet. It got updated as,
23 you know, further analysis was conducted. So there's
24 different versions of the spreadsheet.

25 We logged them separately, which is why you see

1 them like that. The underlying facts that roll up into this
2 conclusion, this analysis, we've all produced to Mr. Clark
3 separately. He has all of the underlying data -- the
4 payment histories and so on.

5 This is -- this we're -- that sort of factual
6 information upon which the conclusion is based have been
7 produced. So naturally we would have produced that. We
8 produced that to all defendants. You know, but it's not in
9 our interest to hide that information.

10 But the actual document we're talking about here
11 is quite different. It was for -- made for internal use,
12 you know? And it has the -- it contains an application of
13 the statutory defenses to what we perceived the facts to be
14 about the transfers at issue, the parties' historical
15 payment relationship and the assessment of our -- what we
16 think new value and ordinary course might actually be
17 properly valued at.

18 So in effect, we're analyzing the strengths and
19 weaknesses of the case in this document. It's totally
20 separate from the underlying data that holds up --

21 THE COURT: So just to summarize then, you're
22 saying that you can't pull out the raw data, which you say
23 you've already provided any of that, but you're saying you
24 can't really redact the opinion analysis, because that's
25 essentially the whole document?

1 MR. BANICH: Well, that's correct. I mean, I'm
2 saying that the underlying data doesn't even appear on this
3 particular spreadsheet. It's a totally -- this spreadsheet
4 that we're -- we've withheld is for bottom line or top line,
5 depending on your perspective, analysis of gross transfers
6 and then some columns about what the likely defenses are
7 worth.

8 THE COURT: What about the column headings? Do
9 they -- do the column headings themselves give any
10 conclusions? Or do they just show the questions that were
11 asked?

12 MR. BANICH: I believe the column headings on this
13 particular document might say like gross transfers, net new
14 value, net of OCB and new value or some words to that
15 effect. And obviously, objective information like what the
16 name of the defendant is and things of that nature. Not
17 very revealing on their own, but that's what they would be.

18 THE COURT: Well, I guess, I mean, this is more of
19 a question for Mr. Clark. When you look at 547(b), the
20 introductory clause that was added, and the most recent
21 amendments, one could certainly take the view that Congress
22 wanted the plaintiffs in these types of witness actions to
23 perform due diligence, not to inquire into the conclusions
24 they reached.

25 So one could take the view that what's really at

1 issue is just the headings as opposed to the opinion
2 information that's underneath the headings. And even as to
3 the waiver point, they're not offering the substance of
4 their legal analysis, they're simply reciting in the
5 complaint and then assuming if it becomes an issue at the
6 trial, they will introduce evidence that they performed due
7 diligence.

8 And it would seem to me that the headings are what
9 they would rely on and arguably what you're entitled to, but
10 not their legal conclusions. I mean, I don't think
11 Congress said, in fact, I know it didn't say it because it's
12 not in the statute, that before you bring such a preference
13 place, you have to assume that you have a greater than, I
14 don't know, 35 percent estimate of succeeding. I mean,
15 Congress I guess could've said that --

16 MR. BANICH: Right. No I think that's --

17 THE COURT: -- although, they would've blown the
18 attorney/client privilege and work/product privilege out of
19 the water if they did. They just said there had to be
20 reasonable due diligence.

21 MR. BANICH: So you're absolutely right. They
22 didn't say that. I think -- and I think Rule 11 covers the
23 (indiscernible) investigation, where to bring the claim, all
24 you have to do is have a reasonable good faith to lead with
25 the facts and the laws to put it.

1 I think what Congress was saying was that
2 plaintiffs shouldn't bring preference actions on transfers
3 where they know that there is a substantial new value
4 defense or an ordinary course of new business defense.

5 THE COURT: Well, except it doesn't say that.

6 MR. BANICH: Well, it says -- okay.

7 THE COURT: It just says has to perform reasonable
8 due diligence.

9 MR. BANICH: Right. But I think -- so in this
10 case, there are hundreds of transfers that are asserted in
11 the preference action. And the plaintiff's position is that
12 every single transfer in the transfer -- in the preference
13 period does not have a defense. It does not have an
14 ordinary course of business defense and does not have a
15 substantial (indiscernible) value defense.

16 THE COURT: Congress didn't say that, either.
17 Congress doesn't say there can't be any possibility of a
18 defense. There's just reasonable due diligence. I mean, I
19 just -- I -- as we all know, defenses are subject, in most
20 cases, although I have had a couple, a good 20 years, where
21 the defense won at summary judgment. It's usually a fact
22 issue.

23 MR. BANICH: Right, right. And again --

24 THE COURT: Where there's a dispute.

25 MR. BANICH: Right. And far be it for me to say

1 what Congress intended, but it looks like from the amendment
2 of the statute, Congress intended something different than
3 what existed before. And what that is, it seems like is an
4 analysis of the reasonably knowable affirmative defenses and
5 a due diligence that is reasonable in the circumstances of
6 the case.

7 And here, what we're asking for is just an
8 identification of what that reasonable diligence was. And
9 their answer is that it's categorically work product. And
10 if they're going to say in discovery that it's categorically
11 work product, then they shouldn't be allowed to close the
12 work product at some future date and say, oh, here's
13 everything that shows the new diligence.

14 And it may be that there's a conclusion in this
15 case that as a matter of law, a due diligence investigation,
16 you know, means you can't be -- they may be (indiscernible)
17 about what that means and that they need not prove anything.
18 And if that's the case, that's the legal conclusion.

19 But if there is a conclusion that they have to
20 prove something related to due diligence, the fact that
21 they're refusing to identify that proof in discovery, we
22 think means they shouldn't be able to rely on that for
23 somewhere down the line.

24 THE COURT: Well, I was positing to you that I
25 could compel them to produce the headings on these

1 spreadsheets, but not the conclusions underneath the
2 headings.

3 MR. BANICH: That's interesting. So sort of --
4 we're envisioning a spreadsheet as saying, you know, the
5 Column A is a preference, it's -- Column A is a payment.
6 Column B is like an invoice for a shipment. Column C is
7 like a median base of payment or whatever.

8 And then, there's this like, extra column that
9 says sort of given the preceding columns, here's the
10 percentage likelihood we think we'll get on this claim.

11 THE COURT: Right.

12 MR. BANICH: Right, right. Well, we'd love to get
13 that, I mean, certainly. I'd be surprised if that was the
14 way that spreadsheet was setup. But I would agree with you,
15 those preceding columns are certainly not work product.

16 THE COURT: Well, it -- they might well be if they
17 -- again, that was the first 10 minutes of this oral
18 argument. It's not really -- you hadn't really briefed that
19 issue. Work product very much can include the work of a
20 non-lawyer, clearly. I mean, it can include an
21 investigator's work.

22 It can include insurance adjuster's work. It can
23 include all sorts of people depending on when they were
24 retained and how they interacted. So just the fact that
25 it's a fact doesn't take it out of the work product

1 doctrine. If you want to brief that issue, you can, but
2 it's not really covered in this motion. So --

3 MR. BANICH: And we certainly can. I mean, sorry.

4 THE COURT: So Mr. Banich, I interrupted you on
5 this point.

6 MR. BANICH: Sure.

7 THE COURT: But I think in reviewing these
8 pleadings, I was coming out basically as follows. First, I
9 think I probably do need to see these spreadsheets in
10 camera, just to make sure that they are what you say they
11 are. I -- and I appreciate there really hasn't been an
12 objection to the privileged log per se.

13 But I think it goes to the second part of my -- of
14 where I was coming out based on reviewing the pleadings,
15 which is that I don't think in this language and in 547,
16 Congress intended to blow a hole in the well-established and
17 sacrosanct, except for limited specific exceptions,
18 attorney/client work product privileges.

19 So and it would appear to me that the very clear
20 exception in Rule 26(b)(3)(b) would in any event shield the
21 production of conclusions, opinions, evaluation. But that
22 the fact of a -- of the valuation, which could be evidenced
23 by the headings, just as it is evidenced by the language in
24 the privileged log itself, while arguably work product, in
25 fact it is work product, I think is just a fact that the due

1 diligence occurred and could be compelled to be produced.

2 So I -- I'm just laying that out there to both of
3 you. And Mr. Banich, you can respond however you want,
4 including making other arguments, but I would like you to
5 address those two points.

6 MR. BANICH: I'm happy to, your Honor, thank you.
7 A couple of points. I would go back -- first of all, let me
8 pick up on one of Your Honor's comments of a moment ago, of
9 how you're, you know, a tentative ruling I guess that
10 Section 547(b) as amended does not to, as Your Honor's
11 expression, blow a hole in attorney/client privilege or work
12 product.

13 It -- obviously, that is consistent with our
14 position in the briefs. It's consistent with the plain
15 language of the statute as amended. It doesn't say anything
16 about privilege or work product. And on top of that, with
17 regard to the idea that we would have to produce a, I guess
18 a redacted version of this document showing the headings, I
19 would ask, if it's -- if the conclusion is that the statute
20 didn't change anything with regard to work product, then you
21 know, why is it that we would have to produce a document,
22 even redacted, that is --

23 THE COURT: Well, it didn't -- no, I'm sorry -- it
24 did change something as to work product. It made due
25 diligence relevant. The fact that due diligence was done is

1 relevant. So it does implicate, I think, 26(b)(3)(a). It's
2 just --

3 MR. BANICH: Right.

4 THE COURT: -- it didn't go so far as to say that
5 -- I think it's process focused, as opposed to conclusion
6 focused, as far as the due diligence.

7 MR. BANICH: Right.

8 THE COURT: And so --

9 MR. BANICH: But I think Your Honor -- yeah, I'm
10 sorry.

11 THE COURT: -- I think it did make that inquiry
12 relevant, which is why it's in the complaint. But it would
13 seem to me that it's the process, i.e., the process of what
14 goes through, similar to the process in the ResCap case of
15 deciding whether a settlement is reasonable.

16 You don't have to go through the conclusions and
17 all of the debate going back and forth, but just that the
18 process happened in a context where you have, you know, in
19 this case, a very large set of preference claims that
20 aggregate a large amount of money. And you know, there was
21 an analysis done.

22 Now I guess Mr. Clark could say, well, what's to
23 prevent someone from just putting headings on and then in
24 real life having nothing underneath, no column, a column
25 that says percentage recovery or likelihood of recovery and

1 then having nothing in it? Or just having 100 percent at
2 each one?

3 But I think frankly that's unlikely here, and
4 probably something that is not a sufficient basis to believe
5 that the Congress meant to have the sort of a blanket waiver
6 of the privilege.

7 MR. BANICH: I agree with that. I would go back
8 to Your Honor's analysis from the discovery conference, when
9 we discussed this very issue. And I believe Your Honor --
10 when raising -- when responding to or discussing Mr. Clark's
11 point about, well, he wants to guard against us, you know,
12 dropping on him presumably in a pre-trial phase, you know, a
13 document that we've withheld as work product up until that
14 point.

15 And Your Honor was like, well, you know, if they
16 don't produce it in discovery, we can't use it. Rule 37(c)
17 is very clear about that. And but on top of that, Your
18 Honor, so well, the privilege log is the proof that it was
19 done. And I think that's still the right answer.

20 You know, going to show -- unless someone's
21 challenging the -- unless the defendant is challenging the
22 detail in our privileged log, which they are not, I don't
23 know why we would have to go beyond what's in the privileged
24 log.

25 That is the purpose and function of Rule 26(b)(5).

1 And if someone is not challenging a privileged log, that
2 means we've satisfied that rule and you shouldn't ordinarily
3 go beyond it. That's the purpose of the log. It puts them
4 on notice of the nature and basis of the claim and we've
5 done that. They don't challenge it.

6 So I would suggest that Your Honor was correct at
7 the discovery conference and said, well, the evidence would
8 be the privileged log. So the -- and obviously, I mean,
9 it's -- it goes without saying if we're trying to protect
10 this document now, we're not going to use it at trial. I --
11 Rule 37(c)(1) itself executing in that regard, if we don't
12 produce in discovery, we literally can't use it.

13 So Mr. Clark can take some solace in that. And
14 so, with regard to your -- the other points, although I'm
15 happy to provide the spreadsheet in camera, you know, it
16 does deal with lots of other targets and defendants, some
17 reluctance to provide that --

18 THE COURT: Well, you could just do the pages that
19 pertain to the -- when they will --

20 MR. BANICH: I understand, we could do that. So
21 the -- but it's important that, you know, I emphasize my
22 agreement with Your Honor's analysis, that you know, the
23 conclusion of what, you know, analysis and what a case is
24 worth is -- falls into your categorical opinion work
25 product, or opinion work product bucket, which is

1 categorically non-discoverable.

2 So I continue to question what the purpose would
3 be of producing even the spreadsheet with just the column
4 headings, if our privileged log is not being challenged
5 given the purpose of Rule 26(b)(5), which is to put them on
6 notice of the basis for claim or privilege.

7 THE COURT: Okay, and --

8 MR. CLARK: And if the privilege log has not been
9 challenged, obviously we've satisfied that rule and
10 shouldn't have to go beyond it. So --

11 THE COURT: Okay.

12 MR. CLARK: -- just if I could just respond?

13 THE COURT: Sure.

14 MR. CLARK: So on the 26(b)(5) point, 26(b)(5)
15 just says that if you withhold documents, you have to
16 provide the privileged log. It doesn't say that if you
17 provide a privileged log you are not -- you'll prove you can
18 submit the privileged log as hearsay proof of the truth of
19 the matter of the documents listed on the privileged log.

20 The privileged log's a double hearsay. So I
21 wouldn't say we're not -- I mean, say we're not challenging
22 the privileged log if they -- it is not true. I mean, it
23 was challenged --

24 THE COURT: Well, you know, and you're also saying
25 that if one got to a trial on this there might be an

1 evidentiary issue just relying on the privileged log. And
2 the plaintiff may want to rely on the headings, right?

3 MR. CLARK: Well, right, right. And it just -- it
4 doesn't -- I've never seen -- I've never been in a situation
5 like this, where somebody said that their privileged log is
6 proof of something they allege in their complaint. That
7 just -- I mean, if you can do that, that would be an
8 important thing to know, I think in the bar, because there
9 are a lot of situations where you're telling like an expert
10 or an investigator or something, you know, go look at this,
11 give me your opinion and then you could just get the opinion
12 back, or like a data analysis firm.

13 Basically like you hire a CPA. Like you would
14 hire a CPA to say look at this, then tell me your response,
15 and then you could just put it in a privileged log and
16 (indiscernible) --

17 THE COURT: Well, no, there's a separate --
18 there's a whole separate set of rules dealing with expert
19 testimony. But anyway --

20 MR. CLARK: Right, totally.

21 THE COURT: -- I understand your point about the
22 evidentiary effectiveness.

23 MR. CLARK: Right. And then, if I could just --
24 yeah, another point, I really -- I doubt that this document
25 that you're going to get has these percentages. I mean, I

1 think what it probably says is the claims are reduced in
2 amount by the substantial lead value. I don't know that it
3 -- I mean, I guess that is a percentage.

4 But there's two types of percentages, right?
5 There's like, a likelihood of recovery percentage, and then
6 just a percentage amount that they're entitled to, right?
7 Because you know, you get the \$100,000 preference payment
8 and you ship \$95,000 worth of goods. Like that -- you would
9 get only five percent of that payment, right?

10 And that's not -- but that's different than you
11 have a 75 percent chance of getting that five percent. So
12 I'd be surprised if that was what that actually said.

13 THE COURT: Okay. All right. Anything else?

14 MR. SMITH: Yes, Your Honor. I would like to know
15 (indiscernible) --

16 THE COURT: No, Mr. Smith. I'm still on this
17 matter. I'm only talking to Mr. Clark and Mr. Banich.
18 We'll get to your matter next.

19 MR. SMITH: (indiscernible) --

20 MR. CLARK: I'm sorry. I do have just two sort of
21 housekeeping things. So we talked earlier about the
22 interrogatories. And I just wanted to confirm that we're
23 going to get supplemental interrogatory responses, like
24 signed interrogatory responses as we discussed.

25 THE COURT: To those two interrogatories.

1 MR. BANICH: What I had proposed to do, and is to
2 simply say in response to those interrogatories without
3 waiving, without being subject to some sort of argument,
4 that by answering them, you know, it affects some sort of
5 waiver in a got-ya manner, I would ask to the objective
6 issues of who has knowledge and what the documents are
7 about.

8 Interrogatory responses are going to say read or
9 privileged log, as I said earlier. Because it contains all
10 that information.

11 THE COURT: Including the --

12 MR. BANICH: I'm happy to do that.

13 THE COURT: -- including the names of the
14 individuals and the like?

15 MR. BANICH: Well, yes, because the privileged log
16 contains a column of who the --

17 THE COURT: Okay.

18 MR. BANICH: -- senders and recipients sign.

19 THE COURT: All right.

20 MR. BANICH: And that's fine.

21 THE COURT: That's fine.

22 MR. BANICH: I mean, that's --

23 THE COURT: And that's clearly not a waiver of the
24 privilege.

25 MR. BANICH: That is --

1 MR. CLARK: That's fine.

2 THE COURT: Okay.

3 MR. BANICH: Yeah, we will do.

4 MR. SMITH: And then the second --

5 THE COURT: Okay.

6 MR. CLARK: You know, Your Honor, I'm sorry if the
7 papers -- if we didn't make clear our objection -- our like,
8 dispute about the notion that we think the facts underlying
9 the opinions or the facts that are referenced in the
10 privileged log, we think under 26(b)(3) those are
11 discoverable.

12 THE COURT: No, but that's a different point.
13 Maybe I wasn't clear how I started this argument off. Rule
14 26 is a mechanism for compelling discovery of otherwise --
15 of privileged material. And you made that point clearly,
16 and I've addressed it. There's a separate argument that I
17 don't believe was made, and I wanted to make sure, and I
18 think I have the answer, it wasn't.

19 It could be sometime in the future potentially,
20 but it wasn't made in this motion, that the information
21 you're seeking in document request number three and in
22 particular as it pertains to the documents that are
23 described on the privileged log, isn't in fact privileged at
24 all. That's a separate point. And I don't think that point
25 was raised. I think that --

1 MR. CLARK: I understand. I'm sorry. Yeah.

2 Sorry, Your Honor. I misunderstood.

3 THE COURT: Okay, all right, very well. Okay. I
4 have before me a motion under --

5 MR. CLARK: I'm sorry, Your Honor. I'm sorry.

6 THE COURT: Oh go ahead.

7 MR. CLARK: Sorry. One more. Is the Court going
8 to issue and order or --?

9 THE COURT: Yeah, I'm going to give you my ruling.

10 MR. CLARK: Okay.

11 THE COURT: And then I'll ask you to provide the
12 order.

13 MR. CLARK: Understood.

14 THE COURT: That's consistent with my ruling.

15 MR. CLARK: And so, you'll do that in a separate -
16 -

17 THE COURT: I'm going to do it right now.

18 MR. CLARK: Okay, I'm sorry.

19 THE COURT: And in bankruptcy cases, since we
20 don't have magistrates to help us out --

21 MR. CLARK: (indiscernible) --

22 THE COURT: -- I rule about 99 percent of the time
23 from the bench because otherwise, their work just wouldn't
24 get done and people need propped answers, if I could give
25 them to them. So I have before me a motion by the defendant

1 in this adversary proceeding, WINIADaewoo that's W-I-N-I-A-
2 D-a-e-w-o-o, Electronics America under Federal Rule
3 Bankruptcy Procedure 7037, which incorporates Federal Rule
4 of Civil Procedure 37, to compel document production and
5 interrogatory responses.

6 We've resolved the aspect of the motion that seeks
7 to compel responses to the movants' interrogatories'' number
8 5 and number 5 as set forth on the record, which will simply
9 be providing the same information that is on the privileged
10 log that's attached as an exhibit to the motion. And the
11 parties have focused, therefore almost entirely, except for
12 resolving that point, on the motions request for production
13 number 3, which seeks documents concerning the "due
14 diligence evaluation" conducted by plaintiff referenced in
15 Paragraph 21 in plaintiff's complaint, which is also
16 referenced in Paragraph 22 of the complaint and arguably
17 dealt with in Paragraph 17 of the underlying complaint.

18 The Plaintiff's objection to the motion is
19 premised on the ground that the documents that have been
20 withheld, which again are on the privileged log that I've
21 already referenced, are in fact properly withheld on the
22 basis of privilege, and that the production of the documents
23 is barred in addition by Bankruptcy Rule 7026, which
24 incorporates Federal Rule of Civil Procedure 26(b)(3).

25 The parties have primarily focused on the

1 applicable law here being federal law, which is in fact what
2 they should've done. As the federal common law privileges
3 applies, when federal law determines the substantive rights
4 of the parties, which is the case here, given that the
5 underlying lawsuit is a creature of the Bankruptcy Code
6 wholly, i.e., the avoidance of preferential transfers under
7 Section 547 of the Bankruptcy Code.

8 See Drennan v. Certain Underwriters at Lloyd's of
9 London (In re Residential Capital, LLC) 575 B.R. 2935
10 Bankruptcy S.D.N.Y. (2017). The record I think clearly
11 reflects that the motion does not assert that the work
12 product and attorney/client privileges don't pertain to the
13 documents listed on the privileged log.

14 I.e., the motion does not dispute any of the
15 elements of those applicable privileges as set forth in
16 Upjohn Company v. United States, 449 U.S. 338, 390, 1981, or
17 the -- as to the attorney/client privilege or the work
18 product privilege as originating with Hickman v. Taylor, 329
19 U.S. 495, 510-11 (1947).

20 Rather, the motion seeks to compel discovery of
21 the documents under either a theory as that Federal Rule of
22 Civil Procedure 26(b)(3) is applicable to the documents
23 listed on the privileged log, or by a theory of waiver. The
24 first theory, again, is based on Rule 26(b), and it provides
25 that with regard to trial preparation, that is the basis for

1 the withholding of almost all of the documents here.

2 "Ordinarily, a party may not discover documents
3 and (indiscernible) things that it prepared in anticipation
4 of litigation or for trial by or for another party or it's
5 representative, including the other party's attorney,
6 consultant, surety, (indiscernible) insurer or agent."

7 But subject to Rule 26(b)(4), those materials may
8 be discovered if they are otherwise discoverable under Rule
9 26(b)(1), and the party shows that it has substantial need
10 for the materials to prepare its case and cannot, without
11 undue hardship, obtain their substantial equivalent by other
12 means.

13 We are not talking here about expert witness
14 preparation or materials, which is covered by 26(b)(4).
15 What we are talking about here is whether the documents on
16 the privileged log fit into the exception in Rule
17 26(b)(3)(a).

18 Now I should note before proceeding that that rule
19 applies only to what would normally be viewed as the
20 attorney -- as the work/product privilege and not the
21 attorney/client privilege. And certain of these documents
22 are claimed to be protected under the attorney/client
23 privilege.

24 But as to the extent that the attorney work or the
25 work product privilege is relied upon, one first needs to

1 determine whether the materials are relevant, which is
2 generally the requirement for Rule 26(b)(1), particularly
3 here, where there's no objection based on burdensomeness or
4 any sort of balancing analysis.

5 And then, also one needs to determine whether
6 there is a substantial need for the materials for the
7 defendant to prepare its case, and whether without undue
8 hardship, they could be obtained or they're substantially
9 equivalent be obtained by other means.

10 The materials are relevant to a new provision of
11 the bankruptcy code, new based on the most recent amendments
12 to the code from 2019. The Congress in those amendments
13 added language to the preference avoidance provision of the
14 Bankruptcy Code Section 547 of Title XI.

15 It stated now in the introductory clause to
16 Section 547(b) in relevant part, the Trustee may, and then
17 here is the new language, "based on reasonable due diligence
18 in the circumstances of the case and taking into account a
19 party's known or reasonably knowable affirmative defenses
20 under Subsection C, avoid any transfer of an interest of the
21 Debtor in property."

22 And then it goes on to list the elements of a
23 preferential transfer in the rest of Section B of 547, and
24 then the defenses in Subsection C. As this provision is
25 new, there are not a lot of cases construing it, but they do

1 state a common theme, which is also well-stated by the
2 leading treatise on Bankruptcy Law, Collier on Bankruptcy,
3 which states in Paragraph 547.02(a), "One can only speculate
4 about the reasons for the change. The most plausible
5 explanation is that it seems to have been the practice for
6 Chapter 11 liquidating trusts to employ what are called in
7 the vernacular preference mills.

8 The same practice may also be prevalent in large
9 Chapter 7 cases. These entities pursue preference actions
10 for the Trustee and take a percentage of the recovery.
11 Their business model is simple.

12 They take the list from the Debtor's statement of
13 affairs of all payments the Debtor made in the 90 days
14 before bankruptcy and filed preference actions against all
15 the recipients without undertaking any investigation of the
16 merits of the causes of action, such as whether the transfer
17 was ordinary course, whether it was COD or otherwise a
18 contemporaneous exchange or any other defense.

19 That they file adversary proceedings in the home
20 court, the defendants have to hire a distant counsel to
21 defend. And this becomes very expensive to defend the
22 action and makes economic sense for the defendants to settle
23 for nuisance value or the cost of defense."

24 Again, that's at 5 Collier on Bankruptcy,
25 Paragraph 547.02(a). The reason one has to speculate for

1 the reasons for the change is that there's no relevant
2 legislative history for this amendment, although it also was
3 discussed in the American Bankruptcy Institute Commission to
4 study the reform of Chapter 11 at Pages 148 - 151 2014,
5 available at <https://abiworld.appdocbox.com>.

6 The limited case law is not clear as to whether
7 reasonable due diligence is in fact an element of the cause
8 of action, although it is stated as an introduction to the
9 cause of action. One Court has concluded it is. *Husted v.*
10 *Taggart (In re ECS REF. Inc.)* 65 V.R. 425, 457-58 (E.D. Cal.
11 2020).

12 Others have stated that they're simply not sure,
13 and don't need to decide in the particular context where the
14 issue arose. See *Solars v. Anixter -- A-n-i-x-t-e-r -- Inc.*
15 *(In re Trailhead Engineering LLC)* 2020 BNKR Lexus 3547 at
16 19-20 (BNKR S.D. Texas December 21, 2020) and *Faulkner v.*
17 *Lone Star Brokering LLC (In re Reagor -- R-e-a-g-o-r --*
18 *Dykes -- D-y-k-e-s -- Motors LP)*, 2021 BNKR Lexus 1643 at
19 Pages 5-7 (N.D. Texas June 18, 2021).

20 Those two cases, as was the case also with the
21 Trail -- I'm sorry, the ECS REF Inc. involved motions to
22 dismiss, and they focused on the language in the complaint.
23 The two Texas cases that I have cited both focused on more
24 than conclusory allegations of conducting due diligence and
25 focused on that the Trustee had reviewed the Debtor's bank

1 and (indiscernible) records, invoices relating to the
2 alleged transfer, correspondence of irrelevant contract.

3 All to show that a level of discretion in bringing
4 the lawsuit was involved, i.e., it was not the type of
5 preference mill activity described in the Collier quote.
6 This is certainly a consistent interpretation with the
7 statute itself, which again simply says the Trustee may,
8 based on reasonable due diligence in the circumstances of
9 the case, and taking into account parties' known or
10 relatively knowable affirmative defenses, avoid a
11 preferential transfer.

12 Congress did not say that the reasonable due
13 diligence have resulted in a conclusion of a, for example,
14 percentage likelihood of recovery or any likelihood of
15 recovery at all for that matter. But simply that there was
16 a reasonable amount of due diligence taken, including with
17 respect to available defenses, which in fact can be taken by
18 looking at the underlying facts for those defenses with the
19 legal context of them as set forth in Section 547 of the
20 Bankruptcy Code.

21 That would involve more than just getting a
22 payment run of payments made during the 90 days before the
23 commencement of the Bankruptcy case, but also look at the
24 records to show that there was -- payment was on account of
25 (indiscernible) the debt, and that it was not subject to a

1 defense, unless the defense was taken into account in
2 bringing the lawsuit.

3 There is a suggestion in the motion that the very
4 operation of the statute itself in essence requires
5 disclosure of the actual due diligence that was done,
6 including the underlying analysis as to the merits, both the
7 preference claim and the defense itself.

8 I do not read the statute that way at all. It is
9 processed based, not a statute based on the underlying
10 substance of the analysis. And I believe the case law has
11 interpreted it that way as well. I do so not only based on
12 the plain language of the statute and the albeit limited
13 case law, but also upon the fundamental importance of the
14 attorney/client privilege and the work/product privilege and
15 their long-standing nature.

16 See, for example, Pritchard v. County of Erie (In
17 re County of Erie) 546 F3d 222, 228 (2nd Cir. 2008), which
18 discusses the importance and long-standing nature of the
19 attorney/client privilege, and in light of that and its
20 purpose, the need to read new waivers or new assorted
21 waivers of the privilege narrowly or carefully.

22 It is also well recognized as a principle of
23 statutory interpretation in addition to those two points,
24 that when interpreting a statute that is asserted to have
25 substantially changed a regulatory or legislative scheme,

1 the Court should assume that Congress did not hide elephants
2 in mouse holes.

3 Epic Systems Corp. v Lewis, 136 Supreme Court
4 1612, 1628 (2008). And frankly, I believe it would be
5 shocking here if Congress meant a waiver of the privilege so
6 that the actual merits of the due diligence analysis would
7 be required to be disclosed given the legal nature of that
8 analysis as a result of the new language added to Section
9 547(b).

10 Again, it's much more likely and a reasonable
11 interpretation given the plain meaning of the statute and
12 the foregoing case law and principles that the statute
13 requires a process evaluation both in terms of the
14 allegations of the complaint and ultimately at trial.

15 So the information that a defendant would need
16 here for purposes of Rule 26(b)(3)(a)(ii), where it must
17 show that it has a substantial need for the materials to
18 prepare its case and cannot without undue hardship obtain
19 their substantial equivalent by other means, is a need to
20 respond to the assertion that as a process matter the
21 plaintiff engaged in reasonable due diligence for purposes
22 of Section 547(b).

23 That information really is within the control of
24 the plaintiff. And so, therefore, the second clause of (ii)
25 would apply. However, the need only really applies to the

1 process point, not to the analysis, the ultimate percentage
2 or other analysis of the merits or the recovery value of the
3 claim. It rather needs to go only to the process.

4 In any event, given the nature of that analysis,
5 which would be opinion work product, it would in all
6 likelihood and in any event not be subject to discovery
7 because of the case law pertaining to discovery of opinion
8 work product and the application of Rule 26(b)(3)(B), which
9 states that if the Court orders discovery of those
10 materials, i.e., the materials covered in 3A, it must
11 protect against disclosure of the mental impressions,
12 conclusions, opinions or legal theories of a party's
13 attorney or other representative concerning the litigation.

14 The Courts have been consistent in saying that the
15 disclosure of such information, if warranted at all,
16 requires a higher standard of a highly persuasive showing or
17 extraordinary justification to secure its release. See, for
18 example, United States v. Petit -- P-e-t-i-t -- 438 F.3d
19 212, 215 (S.D.N.Y. 2020).

20 On the other hand, it appears to me that the
21 defendant is entitled to a redacted version of the
22 assertively privileged materials, which would show the
23 headings, which would indicate the process that the
24 Plaintiff went through in conducting its due diligence.

25 It's understood, I believe, that the plaintiff

1 intends to rely upon the privileged log in part for showing
2 its compliance with the new clause in Section 547 pertaining
3 to due diligence. And I believe it may well want to rely
4 also as evidenced on the headings in those materials, which
5 may mean for admissibility purposes to be admitted
6 separately.

7 Obviously, the headings would not include -- and
8 if for some reason they do, they should be redacted under
9 Rule 26(b)(3)(B) in a opinion conclusion or legal theory,
10 but simply show the process pursuant to which the analysis
11 was done to serve the due diligence element.

12 The other basis for the motion is a waiver theory.
13 There are, I believe three different theories of waiver that
14 might be applicable here. But I conclude that none of them
15 apply except arguably as to what I've required anyway under
16 Rule 7026(b)(3)(A).

17 First, a waiver of the privilege, whether it's
18 attorney/client or work/product is recognized where the
19 party asserting the privilege has nevertheless used the
20 privileged information in an offensive way.

21 The Courts frequently make the distinction between
22 using the privilege only as the shield and not also as a
23 sword. A subset of that waiver argument is the so-called
24 selective use, where a part of the privileged material is
25 used, but not all of it.

1 And a third is the so-called at issue doctrine, to
2 the extent that it may apply in the federal case law as
3 opposed to where it clearly applies to the New York State
4 Case Law. Here, the substance of the due diligence
5 materials is not being used offensively, nor is it at issue
6 because the at issue rule generally applies to the substance
7 of the (indiscernible) privileged matter being placed at
8 issue.

9 But there is no issue of the substance, as I read
10 Section 547, to the extent it requires reasonable due
11 diligence. Again, that is a process point as opposed to an
12 analysis of the substance of the due diligence, where it
13 requires a process showing as opposed to a showing of the
14 substance of the due diligence, the actual evaluation that
15 was conducted, as a process matter needs to be shown, but
16 not the outcome of that evaluation.

17 In that sense, it's also clear that the documents
18 are not being used selectively. They're only being used to
19 the extent they're relevant to the actual issue raised by
20 547(b)'s new language.

21 And finally, given that they're not being used
22 offensively, it is part of the underlying issue. And it
23 would therefore not be unfair to preclude the movant's
24 access to the withheld information, since it truly is not an
25 issue in this litigation and not being placed at issue.

1 See generally, in addition to the previous cases
2 cited, NYU Winthrop Hospital v. Microbion Corp. 405 F3d 387
3 (E.D.N.Y. 2019). In re Residential Capital LLC, 536 B.R. at
4 Pages 146 - 148. And Pereira -- P-e-r-e-i-r-a -- v. United
5 Jersey Bank 1997 U.S. District Lexus 19751 (S.D.N.Y.
6 December 11, 1997).

7 And except to the extent subsequently narrowed as
8 to waiver by Pritchard v. County of Erie 546 F.3d 222.
9 Granite Partners, LP v. Bear Stearns & Co. 184 FRD 49, 55
10 (S.D.N.Y. 1999). I find the Granite Partners and
11 Residential Capital cases particularly instructive here.

12 Both of them I think focus closely on what is in
13 fact at issue in the litigation, and I believe lead to the
14 conclusion that I've reached, which is that where the issue
15 is a process issue as opposed to a legal conclusion
16 underlying a defense, which is I believe the case here, as
17 was also the case in ResCap.

18 The at issue waiver doesn't apply. So I will
19 require the disclosure of the headings to the documents
20 listed on the privileged log. It has been argued that the
21 privileged log itself is enough and that the headings
22 therefore don't need to be required.

23 But I believe it to be at least likely enough that
24 the plaintiff will want to introduce the headings on the
25 documents that -- into evidence that it should be provided

1 or they should be provided now to the movant. I stated
2 during oral argument that I would like to confirm that the
3 documents are what they say they are and the privileged log,
4 given the limited number of those documents, I think that's
5 warranted here, although it may be overkill.

6 And to minimize the burden, all that needs to be
7 produced to me is the cover page of the respective documents
8 and the portion that applies to the defendant here,
9 WINNIADAewoo.

10 So I'm going to ask Mr. Clark, the movant's
11 counsel, to prepare that order. You don't need to recite
12 any of my rulings or the -- I mean, I'm sorry, the bench
13 ruling behind it. You can simply refer to the bench ruling
14 set forth on the record of the hearing and then state what
15 I've -- that I've denied the motion except as set forth
16 below. And then set forth where I have granted it or how I
17 have granted it.

18 You don't need to formally settle that order on
19 Mr. Banich, Mr. Clark, but you should run it by him before
20 you email it to chambers, so he can make sure it's
21 consistent with my ruling. And you should copy him
22 obviously on the email to chambers.

23 MR. CLARK: Okay.

24 THE COURT: I think you --

25 MR. BANICH: Can I ask a clarification question?

1 THE COURT: Yes, go ahead, Mr. Banich.

2 MR. BANICH: Thank you. I'm sorry. Thank you. I
3 understand your ruling regarding the redacting of production
4 of the redacted documents that pertain to the spreadsheets.
5 We did also withhold emails. And I don't hear your ruling
6 to be pertaining to the emails that are withheld --

7 THE COURT: Well, those are attorney/client, so I
8 don't --

9 MR. BANICH: Right.

10 THE COURT: -- think that's covered by Rule 7026.
11 I'm just referring -- at this -- in this ruling, I'm
12 referring only to the work product. If it's
13 attorney/client, Rule 7026 doesn't apply and I've found that
14 there's no waiver.

15 MR. BANICH: Okay.

16 THE COURT: So --

17 MR. BANICH: So just the spreadsheet --

18 THE COURT: Right.

19 MR. BANICH: Okay. That's fair. I understand.

20 THE COURT: Okay.

21 MR. CLARK: And so that's -- okay. And then,
22 there was also the interrogatories?

23 THE COURT: Yes, that's -- that will be in the --
24 you put that in the order, too.

25 MR. CLARK: Okay, okay.

1 THE COURT: Yeah. Good -- as I -- you know,
2 consistent with what I've said needs to be disclosed in the
3 answers to those interrogatories.

4 MR. CLARK: Okay. All right, thank you, Your
5 Honor.

6 THE COURT: Okay. Thank you both. All right.
7 The last matter on the agenda, and I know Mr. Smith has been
8 patiently waiting for this, is Item 4. It is James Smith's
9 motion to extend the time to appeal the Court's order
10 granting the Debtor's objection to his claim in this case,
11 his proof of claim in this case. So I have --

12 MR. SMITH: Yeah --

13 THE COURT: I -- just so both of -- both sides
14 know, I have reviewed the motion, and the Debtor's objection
15 to it. So I have the benefit of that. And I'm happy to
16 hear brief oral argument. But again, the oral argument
17 needs to focus on the particular requirements to be shown
18 for granting a motion to extend the time to appeal an order,
19 which are set forth in Bankruptcy Rule 8002(d)(1).

20 So that's really what I'm focusing on here because
21 that -- that's what governs the determination of this
22 motion. I don't have to hear oral argument. The parties
23 have laid out their positions and their pleadings, but I'm
24 happy to hear brief oral argument. So Mr. Smith, you are --
25 you have the burden of proof here as to whether this

1 standard and Rule 8000(d)(2)(i) is satisfied, so you should
2 go first.

3 MR. SMITH: Okay. I felt that the motion for me
4 to be able to file as for an extension of time was literally
5 apparent in Paragraph 4, Question 4 or Answer 4, where it
6 says, "On the 25th, Mr. Smith failed (indiscernible) at the
7 hearing."

8 And nonetheless, the Court reviewed the
9 consideration and considered to give the 23rd omnibus
10 objection to the client because of the fact that he wasn't
11 there or wasn't able to give an answer to any of their
12 rebuttals or wanted (indiscernible) with answers for my
13 paperwork.

14 So I think just based off of them just trying to
15 move the case along without actually giving me a chance to
16 participate based on early recess, I'm not sure what
17 happened on that day. But it didn't involve me not being
18 able to appear because of COVID-19, basically was the cause
19 to that.

20 THE COURT: Well, did you have COVID-19 or --?

21 MR. SMITH: No, but due to COVID-19 and
22 coronavirus, there was no way for people to actually make it
23 to New York. What do you mean, if I've been tested for it?

24 THE COURT: Well, it -- just that the Court was
25 holding hearings. This hearing was held at that time on May

1 25 --

2 MR. SMITH: No, not at that --

3 THE COURT: -- by telephone.

4 MR. SMITH: Yes sir. No, it has -- somehow, it
5 had replaced it in early recess, and then it went straight
6 to -- from the 18th to the 25th, there was really -- to me,
7 I don't know. I tried to log in and I was having the
8 hardest time getting like logged in and I was just told that
9 I would be able to -- since I missed it, I would be able to
10 get the transcripts and also file an appeal. I couldn't
11 read the document that I had sent, so I had to literally be
12 patient and try to come up with the best solution to
13 resubmit it.

14 THE COURT: Right. Well, why don't you tell me,
15 what is it that you would have said or are saying?

16 MR. SMITH: Basically, I was going to say that
17 based off of the information that I have supplied, the
18 company basically has given me the -- I think it's called an
19 -- I apologize. It's called an administrative claim. The
20 only reason why I was unable to reflect off of a payment
21 from Weil, Gotshal and Manges was because they keep
22 questioning everyone's documents for legitimacy.

23 And I was told that they were just to pay out
24 these documents. And as a senior director for Sears Roebuck
25 & Company as a consultant, I do find it very odd that I did

1 turn in the same documents that sometimes they do ask for
2 again, and try to think that they didn't receive them.

3 And that's why I had to make sure that the judge
4 received a full set of what I have already sent. And I just
5 followed it up with the Court to make sure that they had
6 reflected on a way to follow.

7 THE COURT: Okay. Well, I have what -- I have all
8 of the documents that have been filed --

9 MR. SMITH: Yes.

10 THE COURT: -- that were filed as part of your
11 claim.

12 MR. SMITH: Yes sir.

13 THE COURT: And I had them back at the May
14 hearing, too.

15 MR. SMITH: Right. So basically what I wanted to
16 let them know was -- is I just wanted to let them know that
17 Sears basically supplies these documents and I haven't been
18 able to make any of my, you know, any money off of my
19 participation and basically because they have held up my
20 paycheck with type of situations like these.

21 And I just don't understand why Sears keeps
22 vouching for my employment and there's always some type of
23 delay. I'm not sure and I don't know why they didn't call
24 the law firm that literally states that they would verify
25 over a billion dollars, but up to a billion dollars if

1 necessary in verified funds for the overall inclusion into
2 the committees that literally sees over those debts so they
3 could be able to cross verify the information. And I
4 thought I saw the same information for (indiscernible).

5 THE COURT: Okay.

6 MR. SMITH: As far as the statement.

7 THE COURT: All right. Okay, thank you.

8 MR. LITZ: Good afternoon, Your Honor. Dominic
9 Litz, Weil, Gotshal & Manges on behalf of the Debtors. Can
10 you hear me all right?

11 THE COURT: Yes.

12 MR. LITZ: Thank you, Your Honor. Your Honor, you
13 noted at the outset this is a hearing on Mr. Smith's motion
14 to extend time to file a notice of appeal. I'm happy to
15 respond to Mr. Smith's allegations about the May 25th
16 hearing, where I feel like our position was (indiscernible)
17 out our papers in the objection, and our response to Mr.
18 Smith reply and the record that was set forth at the May
19 25th hearing.

20 However, going back to what Mr. Smith said, excuse
21 me, about the Debtor's objection to this motion, I would
22 just like to re-read Paragraph 4 to correct the record where
23 it notes on May 25th, 2021, Mr. Smith failed to appear at
24 the hearing. Nonetheless, the Court reviewed and considered
25 Mr. Smith's response.

1 And at the hearing, the Court sustained the 23rd
2 omnibus objection and disallowed and expunged the claims in
3 full. The Court ruled on the substance of the claims or
4 lack thereof and did not rule against Mr. Smith based on his
5 failure to appear at the hearing.

6 The Court found that the claims lacked merit and
7 Mr. Smith's claims (indiscernible) response lacked
8 credibility. Your Honor, I don't think there's much more
9 that I need to go into on the merits of the claims.

10 With regards to Mr. Smith's motion that's before
11 the Court today, the Debtor's position is that he has failed
12 to prove excusable neglect, which is required by Bankruptcy
13 Rule 8002(d)(1)(b) to have the Court grant an extension of
14 time to file a notice of appeal. I'm happy to answer any
15 questions Your Honor has.

16 THE COURT: Okay. All right, thank you. All
17 right. I'm going to give you my ruling on this motion now.
18 I have before me a motion by Mr. Smith for an extension of
19 his time to appeal my order that disallowed his proof of
20 claim filed in this case. The timing here is important. I
21 signed that order on June 7, 2021.

22 That followed a hearing on the Debtor's claim
23 objection, which took place on May 25, 2021. The normal
24 time to file an appeal under Bankruptcy Rule 8002 is 14 days
25 after the date of the order, which would've been June 21,

1 2022. However, Bankruptcy Rule 8002 provides an -- in
2 Paragraph D, for an extension of the time to appeal.

3 It states as except as provided in Subsection
4 (d)(2), which is not relevant here, the Bankruptcy Court may
5 extend the time to file a motion -- I'm sorry -- to file a
6 notice of appeal upon a party's motion that is filed (b)
7 within 21 days after the time prescribed by this rule, i.e.,
8 21 days after the 14 days provided for an appeal.

9 And then, the rule goes on to say, "If the party
10 shows excusable neglect." Here, the motion was filed on the
11 21st day after the 14 days for an appeal as of right under
12 Rule 8002(a)(1), which is technically within the deadline
13 set forth in Rule 8002(d)(1).

14 The rule, as I quoted it, permits the motion to be
15 granted only if, again, the movant, Mr. Smith, shows
16 excusable neglect for his not having previously timely filed
17 his appeal. The Bankruptcy Court is the court to decide
18 this issue as opposed to the District Court, where the
19 appeal might be filed, see *Joslin V. Wechsler* -- W-e-c-h-s-
20 l-e-r -- (In re Wechsler) 246 B.R. 490, 492 (S.D.N.Y. 2000).
21 And In re Enron Corp. 364 B.R. 482, 486 (S.D.N.Y. 2007).
22 Both of which cases also note that the rule requires a
23 showing of excusable neglect.

24 The Supreme Court addressed the meaning of
25 excusable neglect in *Pioneer Investment Services Company v.*

1 Brunswick Associates, LP, 507 U.S. 380 at 387 through 88 and
2 then at 395 1993. First, the movant must show that its
3 failure or his failure in this case to file timely
4 constituted neglect as opposed to willfulness or knowing a
5 mission.

6 Neglect generally would be attributed to a
7 movant's inadvertence, mistake or carelessness. I don't
8 believe here that Mr. Smith's failure to file his appeal
9 within the 14 days prescribed by Rule 8000 (2)(a)(i) was a
10 matter of a conscious choice or knowing act, but rather was
11 due to inadvertence or carelessness. But that's just the
12 first prong of the standard.

13 After establishing neglect as opposed to
14 willfulness or knowledge of the bar date or the deadline and
15 the failure to show any unknowing basis for neglecting it,
16 the movant must show by a preponderance of the evidence that
17 the neglect was "excusable". That analysis is to be
18 undertaken on a case by case basis, that is based on the
19 particular facts of the case.

20 Although the Court is guided by and makes the
21 determination balancing the following factors: A, the danger
22 of prejudice to the Debtor; B, the length of the delay and
23 whether or not it would impact the case; C, the reason for
24 the delay; and in particular, whether the delay was within
25 the control of the movant; and D, whether the movant acted

1 in good faith in a 395.

2 However, inadvertence, ignorance of the rules or
3 mistakes construing the rules do not usually constitute
4 excusable neglect, *Midland Cogeneration Venture LP v. Enron*
5 *Corp (In re Enron Corp)*, 419 F3d 115, 126, 2nd Cir. 2005.
6 In that case, the Second Circuit held, "We have taken a hard
7 line in applying the pioneer test. In a typical case, three
8 of the pioneer factors -- the length of the delay, the
9 danger of prejudice and the movant's good faith usually
10 weigh in favor of the parties seeking the extension."

11 We have noted, though, that we and other circuits
12 have focused on the third factor, the reason for the delay,
13 including whether it was within the reasonable control of
14 the movant. And we've cautioned that the equities will
15 rarely if ever favor a party who fails to follow the clear
16 dictates of the Court rule.

17 And that where the rule is entirely clear, we
18 continue to expect that a party claiming excusable neglect,
19 will, in the ordinary course lose under the pioneer test.
20 And that's not -- and thus, not get the extension. The
21 Courts have made it clear that the foregoing law applies to
22 pro se litigants like Mr. Smith as well as to those who have
23 lawyers, as stated in *In re Enron Corp*. 364 B.R. at 488,
24 simply to inspire a pro se litigant of the applicability of
25 an expressly stated time limitation does not constitute

1 excusable neglect.

2 Citing Riedel -- R-i-d -- R-i-e-d-e-l v.
3 (indiscernible) Midland Bank 1997 U.S. District Lexus 4551
4 at Page 2 (N.D.N.Y April 10, 1997). Here, I've reviewed
5 carefully Mr. Smith's motion and it does not set forth a
6 basis that would establish excusable neglect.

7 He has stated that he wants more time to obtain
8 counsel to help him on an appeal or to help him to
9 understand his position and to look into the cases before
10 choosing whether to dismiss them or not. Under the
11 foregoing case law, that does not constitute a reasonable
12 excuse for the delay here and would require the denial of
13 the motion.

14 In addition, while I believe clearly that Mr.
15 Smith has acted in good faith, the length of the delay here
16 and the danger of prejudice to the Debtor are both also
17 points that argue in favor of denying the motion.

18 That's not because simply the fact that the Debtor
19 would have to deal with an appeal, but rather, given the
20 nature of the claim, which is of enormous size, over a
21 billion dollars, and what I believe to be the very clearly
22 lacking nature of the proof for the claim.

23 I understand and regret that Mr. Smith did not
24 attend the May 25 hearing. People always want to be heard,
25 and I have heard Mr. Smith today on the merits of his claim.

1 But it is clear to me, based on my recollection of the
2 hearing, as well as my review of the transcript of that
3 hearing, that particularly pages 17 through 19 of that
4 transcript, that I did not rule on the basis of his
5 nonappearance.

6 I did not treat this as a default judgment. In
7 other words, rather, I based my ruling on my review of the
8 claim objection, which I believe clearly shifted the burden
9 to the extent the claim was a general unsecured claim, onto
10 Mr. Smith. And that was a burden that he held, in any
11 event, with regard to the claims assertion that it was
12 secured or administrative.

13 And the documents attached to the claim and the
14 claim itself simply do not carry that burden. And his
15 reference to them today and discussion of them similarly
16 does not carry that burden. Again, I've reviewed those
17 documents. I reviewed them before the May 25th hearing, and
18 I concluded then that they don't state a claim.

19 So therefore, it would in fact be prejudicial to
20 the Debtor to have to pursue an appeal after the deadline in
21 light of the merits here, as well as the impact of having
22 such a large and I believe not meritorious claim hanging
23 over the case.

24 Those are separate reasons for denying the motion,
25 given the Enron cases, however, they're not necessary, since

1 I've concluded that the reason for the delay was within the
2 control of Mr. Smith. So I will ask the Debtor's counsel to
3 submit an order denying the motion for the reasons stated in
4 the Court's benchroom.

5 MR. LITZ: (indiscernible), we will do so.

6 THE COURT: Okay.

7 MR. SMITH: But I do have a question in regards to
8 your (indiscernible) to grant the extension of time. Adobe
9 scans did not -- literally has a back color drop that
10 (indiscernible) your Court is not able to understand it.
11 And it was literally on a weekday.

12 So the inclusion of the 24-hour military time for
13 me to resubmit the documents based on the fact that I had to
14 literally have someone else do it for me, I did not include
15 that, like the burden of how long it took me to get it done.
16 But it was not very many days after, because I wasn't able -
17 - communicating with your --

18 THE COURT: Okay. Well, again, I -- the
19 bankruptcy rules lay out a maximum of 34 days. And you are
20 within that 34 days, but --

21 MR. SMITH: Right.

22 THE COURT: For the last 21, to have the motion
23 granted, you have to show excusable neglect for not having
24 met the 14. And I -- I'm not able to find that today. So -
25 -

1 MR. SMITH: Great. That (indiscernible) came from
2 the application being faulted because I had the same
3 application error with -- Carvano was also not able to
4 reflect or understand the documents as well. So I can
5 literally use the Adobe scan application as a cause for
6 documents that can be sent as a PDF through the internet as
7 an email will not come out readable. And that literally
8 just gave me the reason not to be able to file an extension.

9 They just wanted me to re-submit the documents. I
10 do have the documents submitted on time, if you really do
11 want to take a closer look. The documents do reflect on
12 time implementations, but your clerk would not submit them
13 to you for me to get a closer court date until I resubmitted
14 them twice. So they were clearly readable.

15 THE COURT: No, but Mr. Smith, the -- it's not the
16 -- it's the motion itself for an extension of time --

17 MR. SMITH: Okay.

18 THE COURT: -- that needs to be filed and the
19 appeal itself, which doesn't require a record. You just
20 filed a notice of appeal, which is a one-page notice. So --

21 MR. SMITH: Right.

22 THE COURT: -- again, I've given you my ruling,
23 and I'm not going to alter it at this point.

24 MR. SMITH: Okay. So what was your ruling to not
25 -- so what about the --

1 THE COURT: I denied the motion. I denied the
2 motion based on the record of today's hearing.

3 MR. SMITH: Okay. So are you -- so what does that
4 mean for me to be able to -- do I have to appeal your
5 decision as well today?

6 THE COURT: Well, my decision is my decision. And
7 I don't -- I'm not going to give you legal advice as to
8 whether you should appeal or whether you have a right to
9 appeal, but that -- I did lay out my decision today and
10 there'll be an order that memorializes it, that will get
11 added probably later this week.

12 And you should keep a look out for that. It'll be
13 mailed to you. It'll be also on ECF, and that will -- if
14 you do have a right to appeal, start your time to appeal
15 that decision. Not the underlying order.

16 MR. SMITH: Okay, so what --

17 THE COURT: (indiscernible) the claim objection, I
18 mean.

19 MR. SMITH: I am sorry. Can you say that one more
20 time?

21 THE COURT: What you will be getting is an order
22 denying your motion for an extension of the time to appeal.

23 MR. SMITH: Okay.

24 THE COURT: And --

25 MR. SMITH: All right.

1 THE COURT: Obviously there is a -- if there is a
2 right to appeal that, there is a time limit to do that. But
3 the appeal --

4 MR. SMITH: Right.

5 THE COURT: -- would be only from that order.
6 There's not a right to appeal from the order granting the
7 claim objection. That time has passed.

8 MR. SMITH: No, the -- sorry, go ahead.

9 THE COURT: So anyway, I'm going to conclude the
10 hearing at this point. And I'll look for that order.

11 MR. SMITH: Okay, sir. I do have a question.

12 THE COURT: Okay.

13 MR. SMITH: I need to make sure that -- so I do
14 have another court date, and it was -- and do I have to -- I
15 am not a lawyer, I don't have --

16 THE COURT: No, Mr. Smith, you don't have another
17 court date. What you might be able to do, and I'm not going
18 to give you legal advice, but you might be able to appeal
19 the order that will get entered on denying the motion that
20 we've just been covering.

21 And but that would be just a notice of appeal that
22 you would file. You don't need a hearing in front of me for
23 that, if you file that notice timely, i.e., within 14 days
24 of the entry of the order.

25 MR. SMITH: If I find the application for me to

1 (indiscernible), then -- the submission number for the day
2 that I turned in the actual paperwork, would you accept that
3 as an on-time filing, because it was filed on time, but
4 (indiscernible) --

5 THE COURT: No. No, I'm just dealing with the
6 motion that was filed on the record for that. So I'm going
7 to have to conclude this hearing, Mr. Smith. And again,
8 I'll look for the order from the Debtor's Counsel.

9 MR. SMITH: Okay, yeah. Have a great day.

10 THE COURT: Okay, thank you. And I think that
11 does it for (indiscernible) hearing for today, correct?

12 MAN: Thank you, Your Honor.

13 THE COURT: On Sears, the omnibus hearing?

14 MAN: That's correct.

15 THE COURT: Great. Thank you.

16 MR. SMITH: Do I have another (indiscernible)? I
17 have another (indiscernible)?

18 (Whereupon these proceedings were concluded at
19 1:22 PM)

20

21

22

23

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I N D E X

RULINGS

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Redacted Documents 90 15

James Smith's motion denied to extend the time to appeal the
Court's order granting the Debtor's objection to his claim
in this case 102 24

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski
Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: July 28 2021

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